

Memorandum

TO: HONORABLE MAYOR AND
COUNCIL

FROM: Joseph Horwedel

SUBJECT: SEE BELOW

DATE: November 16, 2011

Approved

Date

11/17/11

COUNCIL DISTRICT: 3
SNI AREA: Five Wounds/
Brookwood Terrace

**SUBJECT: PUBLIC HEARING ON THE APPEAL OF THE PLANNING COMMISSION'S
CERTIFICATION OF THE FINAL ENVIRONMENTAL IMPACT REPORT
FOR MOE'S STOP GAS AND SERVICE STATION AND ON THE APPEAL OF
THE PLANNING COMMISSION'S APPROVAL OF THE CONDITIONAL USE
PERMIT, FILE NO. CP11-049.**

RECOMMENDATION

- (a) Conduct an Administrative Hearing on and consider an Appeal of the Planning Commission's certification of the Final Environmental Impact Report (FEIR) for the proposed project, Moe's Stop Gas and Service Station, File No. PP11-049, a Conditional Use Permit to allow the demolition of an existing single-family detached residence, the expansion of an existing gas and service station, and other modifications, for property located at the southeast corner of McKee Road and N. 33rd Street. In addition, consider adoption of a resolution to uphold the Planning Commission's certification of the FEIR and certify that:
 - (1) The City Council has read and considered the Final EIR;
 - (2) The Final EIR has been completed in compliance with the California Environmental Quality Act (CEQA);
 - (3) The Final EIR reflects the independent judgment and analysis of the City of San José; and
 - (4) The Director of Planning, Building and Code Enforcement shall transmit copies of the Final EIR to any other decision-making body of the City of San José for the project.
- (b) Conduct an Administrative Hearing and consider an Appeal of the Planning Commission's decision to approve a Conditional Use Permit for the Moe's Stop Gas and Service Station project, File No. CP11-049, and consider adoption of a resolution approving this Conditional Use Permit.

OUTCOME

Rejection of the appeal and certification of the Final Environmental Impact Report (EIR) will allow the City Council to consider the adoption of the Conditional Use Permit for the Moe's Stop Gas and Service Station project, for which the Final EIR was prepared.

Upholding the approval of the Conditional Use Permit would allow the applicant to expand his gas station.

BACKGROUND

On July 11, 2011, Amir Shirazi, the owner of Moe's Stop, applied for a Conditional Use Permit to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station, located at the southeast corner of McKee Road and N. 33rd Street. Three additional gas pumps and a canopy for the new pumping facility would also be constructed. The driveway into the station on 33rd Street would be relocated to allow a new exit and entry. The application included fees for the preparation and distribution of an EIR for the project (SCH #2011062068). The EIR is available on the Planning Division website at:
< www.sanjoseca.gov/planning/eir/eir.asp > .

The applicant had previously filed a Conditional Use Permit application in 2009, File No. CP09-015, and an Initial Study/Negative Declaration (ND) was prepared for the project by the City of San José. That application was approved by the City Council on appeal on June 15, 2011. Thereafter, a neighboring business sued the City alleging that an EIR was required, rather than an ND, because the project may have a significant impact on traffic at the intersection of 33rd Street and McKee and on the soils due to a historic gasoline leak from an underground tank there. The case was heard by the California Superior Court for Santa Clara County on March 11, 2011 (case no. 1-10-CV-176412). On March 29, 2011, the court issued a Writ of Mandate requiring the City to prepare an Environmental Impact Report (EIR) for the project to evaluate traffic impacts. The court did not find the ND's hazardous materials analysis inadequate under CEQA. The previous file for the subject project, CP09-015, was deemed voided, since the permit did not have adequate CEQA clearance once the court invalidated the ND prepared for the project. A new application, CP11-049, was initiated for the gas station proposal.

Acting as lead agency, the City prepared a Draft EIR for this project in accordance with CEQA. San José Municipal Code Chapter 21.07 designates the Planning Commission as the initial decision-making body for the conditional use permit for this project, as well as for the certification of environmental impact reports. The Planning Commission must hold a noticed public hearing prior to certifying a final environmental impact report.

On November 2, 2011, the Planning Commission conducted a public hearing on the Draft EIR and the related Conditional Use Permit in accordance with the Municipal Code. The Draft EIR, taken together with the First Amendment (containing responses to comments received on the Draft EIR during the document's public review period) constitutes the Final EIR for this project. The Planning

Commission listened to public testimony and then discussed the items. The Planning Commission found and certified that (1) the Final EIR has been completed in compliance with CEQA; (2) the final EIR was presented to the decision-making body of the lead agency and the decision-making body reviewed and considered the information contained in the Final EIR prior to approving the project; and (3) the Final EIR reflects the independent judgment and analysis of the lead agency (4-0-2-1, Kamkar and Abelite absent; and Platten abstaining). The Planning Commission then approved the Conditional Use Permit for the proposed expansion of Moe's Stop Gas and Service Station in a separate motion (5-0-2, Abelite and Kamkar absent).

On November 4, 2011, James Dombroski, on behalf of Andy's BP, a neighboring business, filed a timely appeal of the Planning Commission's certification action. The appeal is available on the Planning Division website at: www.sanjoseca.gov/planning/eir/eir.asp, and is incorporated herein by this reference. When an environmental impact report is certified by a non-elected decision-making body of the local lead agency, that certification may be appealed to the local lead agency's elected decision-making body, which process has been codified in Title 21 of the San José Municipal Code. The Council's review of the Final EIR on appeal is a de novo review.

Upon conclusion of the certification appeal hearing, the Council may find and certify that the Final EIR has been completed in compliance with the requirements of CEQA. If the Council makes such a finding and certification, it shall uphold the Commission's certification of the Final EIR. If the Council finds that the Final EIR has not been completed in compliance with CEQA, the Council must require the Final EIR to be revised and the City may not take any action on the project until the project has an EIR that the Planning Commission, or Council on appeal, finds to be adequate under CEQA. Council decisions on the adequacy of an environmental impact report are final.

ANALYSIS

A timely appeal of the Planning Commission's certification of the Final EIR was filed by attorney James Dombroski representing Andy's BP, a neighboring business. The appeal references letters submitted to the City of San José on October 17, 2011 and November 1, 2011. Responses to the October 17, 2011 letter were incorporated into the First Amendment to the EIR. Responses to the November 1, 2011 letter were presented verbally to the Planning Commission at their November 2, 2011 hearing, and are presented here in writing. For Council's convenience, a copy of the November 1, 2011, letter is attached to this report. For the purposes of this memorandum, and to keep repetitive information to a minimum, this report responds to the November 1, 2011 submittal, since responses to the October 17, 2011 letter can be reviewed as a part of the First Amendment to the EIR. The appeal argues that the Final EIR is inadequate based on the following points, with responses following each point:

- **The court's Writ of Mandate did not limit the EIR to traffic impact.**

This contention by the appellant is incorrect. Public Resources Code Division 13, Section 21005(c), states, "It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action

without compliance with this division, *shall specifically address each of the alleged grounds for noncompliance.*" [Emphasis added.]

The Court's Order, which is attached, specifically indicates that a fair argument was raised regarding potential traffic impacts, and that the remedy is to prepare an environmental impact report. The Order does not indicate that fair arguments were raised related to other potential environmental effects. Nevertheless, all environmental topic areas called out in the CEQA Guidelines were, in fact, analyzed in the Final EIR through the preparation of an Initial Study. The Initial Study is included in the Final EIR as Appendix A to the Draft EIR.

- **The issue of hazardous materials was raised in the Verified Petition for Writ of Mandate.**

Potential impacts from hazardous materials were analyzed in the Initial Study of the Final EIR and in Response A1 of the First Amendment to the EIR.

- **The City's response to evidence of contamination must be rejected because the reports offered by the City are not made under the penalty of perjury.**

The requirement for a penalty of perjury declaration is a requirement for submitting groundwater monitoring reports to the Santa Clara County Department of Environmental Health, and is not related to CEQA. Nevertheless, groundwater monitoring reports are included in Attachment 1 of the First Amendment to the Draft EIR, which is a part of the Final EIR, and those reports include penalty of perjury declarations, labeled Attachment E, Client Authorization Letter.

- **The Traffic Impact Analysis (TIA) recommendation for an on-site circulation plan is hazardous and will cause an increase in street congestion.**

The original approval for a gas station on the site included three driveways. The driveway closest to the intersection along McKee previously allowed only right turns in and out of the site. The fact that vehicles entering the site would brake soon after crossing the intersection created a potential hazard. The current proposal would eliminate this inbound driveway that is too close to the intersection. A second full-access driveway along 33rd Street caused drivers to potentially back up into the intersection as they turn right onto 33rd from McKee. The full access driveway would be moved south, providing ample queuing and storage that does not conflict with the intersection operations at McKee and 33rd Street. By directing traffic away from the intersection, currently existing conflicts would be minimized, therefore improving operations and the congestion surrounding the project driveways.

- **The EIR should be rejected because Mr. Shirazi has violated the Court's Order and the City's Stop Work Order.**

This issue was raised and responded to in the First Amendment to the EIR, which is a part of the Final EIR, under the response to A4. Simply put, compliance with State and local laws is not a CEQA-related issue in this instance requiring analysis in the EIR.

It is staff's opinion that the November 1, 2011, letter does not raise any new issues that were not already analyzed as a part of the Final EIR, or that would require additional analysis, or that any of the issues raised change the impacts analysis contained in the Final EIR that was prepared and completed.

There were no significant environmental impacts identified in the Final EIR, and therefore no mitigation measures are required.

Appeal of the Conditional Use Permit

The Appellant's appeal of the Conditional Use Permit raises the exact same issues regarding the Final EIR that were raised in the October 17, 2011 and November 1, 2011, letters, and therefore are addressed as set forth above and in the First Amendment to the EIR. It is staff's opinion for the reasons described in this memorandum that the Final EIR complies with the provisions of CEQA, discloses the potential environmental impacts of the project, and can be used as a part of upholding the Planning Commission's approval of the Conditional Use Permit.

Should the Council decide to uphold the Final EIR's certification, attached is the staff analysis on the proposed expansion of Moe's Stop Gas and Service Station for the Council's consideration of the Conditional Use Permit.

CONCLUSION

The Moe's Stop Gas and Service Station Final EIR meets the requirements of CEQA by disclosing the environmental effects of the project and describing reasonable alternatives to the project. Because the analysis indicates that there would be no significant environmental effects from the project, there is no need to propose mitigations to mitigate any significant environmental effects. In a similar way, because there are no significant unavoidable environmental impacts, there is no need for a statement of overriding considerations with regard to the project.

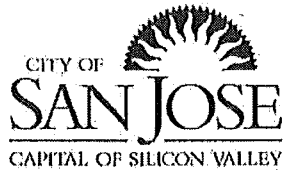
/s/

JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

For questions, please contact John Davidson at 408/535-7895.

Attachments:

- Petition for Writ of Mandate (CEQA)
- Letter from James Dombroski dated November 1, 2011
- Reports to the Planning Commission regarding CP11-049



Memorandum

TO: PLANNING COMMISSION

FROM: JOSEPH HORWEDEL

SUBJECT: SEE BELOW

DATE: October 26, 2011

COUNCIL DISTRICT: Citywide
SNI AREA: all

SUPPLEMENTAL MEMO

SUBJECT: CP11-049. DISTRIBUTION OF THE FIRST AMENDMENT TO THE MOE'S STOP GAS & SERVICE STATION ENVIRONMENTAL IMPACT REPORT (EIR)

REASON FOR SUPPLEMENTAL

This memo is to distribute the First Amendment to the Moe's Stop Gas and Service Station EIR to the Planning Commission. The comment period for the Draft EIR (State Clearinghouse #2011062068) ended on October 17, 2011, and the First Amendment, which consists of comments received from the public and the City's responses, was prepared after the close of the comment period. Taken together, the Draft EIR and the First Amendment represent the Final EIR.

BACKGROUND

The applicant, Amir Shirazi, has submitted an application for a Conditional Use Permit to expand his gas station, located at the southeast corner of McKee Road and N. 33rd Street. The project consists of the demolition of an existing single-family detached residence and the expansion of an existing gas and service station. Three additional gas pumps and a canopy for the new pumping facility will be constructed. The driveway into the station on 33rd Street will be relocated to allow a new exit and entry.

The City originally prepared an Initial Study/Negative Declaration for the project in 2009. A neighboring business sued the City on the grounds that the Negative Declaration did not adequately address traffic. The case went to the California Superior Court for Santa Clara County on March 11, 2011 (case no. 1-10-CV-0176412). The court issued a Writ of Mandate requiring the City to prepare an EIR for the project, specifically to address traffic impacts.

PLANNING COMMISSION

October 26, 2011

Subject: Final EIR for Moe's Stop Gas and Service Station

Page 2 of 2

ANALYSIS

During the comment period, the City received one comment letter from Mr. James Dombroski, the attorney for a neighboring business. In the comment letter Mr. Dombroski contends that:

1. The EIR does not analyze leaking underground storage tanks at the subject site;
2. The EIR relies on inaccurate data for the traffic analysis; and
3. The EIR does not address the applicant's failure to comply with state and local laws.

The First Amendment includes responses to these comments. Specifically:

1. The EIR includes an analysis of hazardous materials impacts, including releases from fuel tanks on the site, and concluded, based on substantial evidence, that the impacts would be less than significant. The analysis is contained within the Initial Study, Appendix A of the Draft EIR. Groundwater monitoring reports are also included as Attachment 1 of the First amendment.
2. The EIR bases trip generation rates on surveys collected from the adjacent gas station, which is appropriate given the similarities in location, amenities, and price (a one cent difference at the time of the counts) between the two uses. Based on these similarities, the traffic surveys represent typical conditions based on current data.

In addition, the number of pass-by trips was determined using standard traffic engineering methodology based on the Institute of Transportation Engineers Trip Generation Manual,

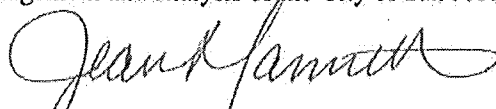
3. Failure to comply with state and local laws is not an issue requiring CEQA analysis as part of an EIR.

The comments raised do not identify any new significant environmental impacts, nor do they change the significance determinations made in the Draft EIR.

RECOMMENDATION

The Director of Planning, Building and Code Enforcement recommends the Planning Commission adopt a resolution to certify that:

1. The Planning Commission has read and considered the Final EIR;
2. The Final EIR has been completed in compliance with CEQA; and
3. The Final EIR reflects the independent judgement and analysis of the City of San Jose.



JOSEPH HORWEDEL, DIRECTOR
Planning, Building and Code Enforcement

STAFF REPORT
PLANNING COMMISSION

FILE NO.: CP11-049

Submitted: 07/11/11

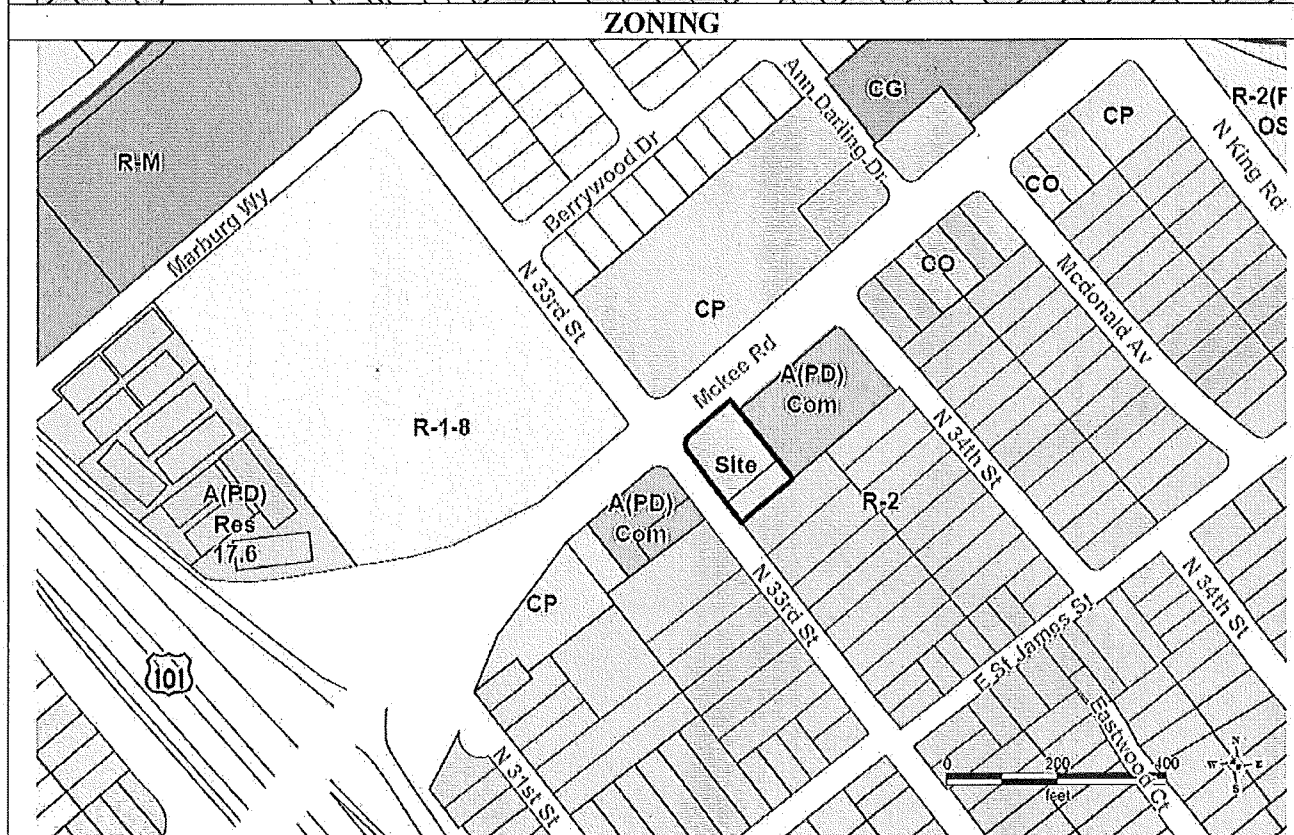
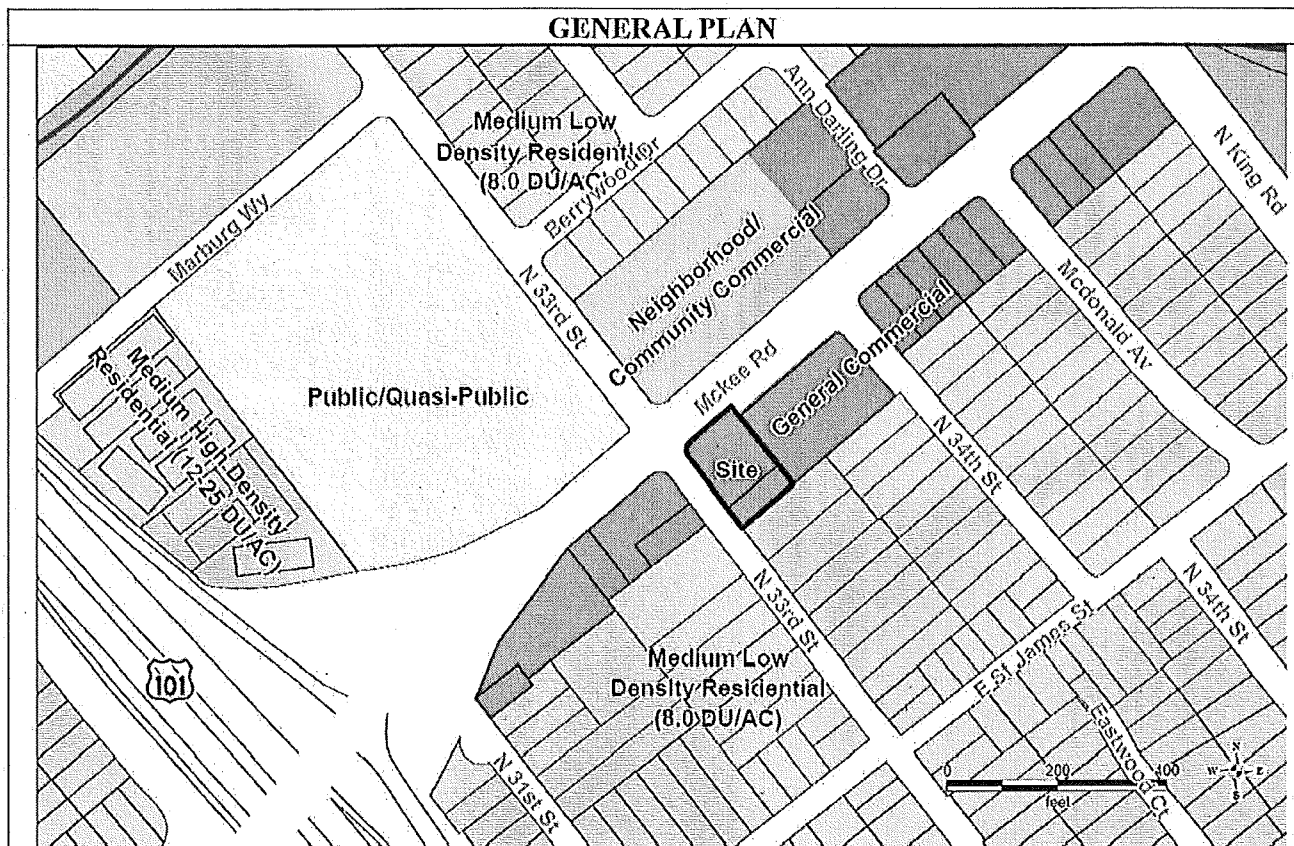
PROJECT DESCRIPTION: Conditional Use Permit to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station on a 0.51 gross-acre site.

LOCATION: Southeast corner of McKee Road and North 33rd Street (1604 McKee Road).

Existing Zoning	CP Commercial Pedestrian
Proposed Zoning	No change
General Plan	General Commercial
Council District	3
Annexation Date	12/01/1911
SNI	Five Wounds/Brookwood Terrace
Historic Resource	No
Redevelopment Area	SNI
Specific Plan	N/A

Aerial Map





RECOMMENDATION

Planning staff recommends approval of the proposed Conditional Use Permit for the following reasons:

1. The project conforms to the General Plan Land Use/Transportation Diagram's designation of General Commercial, as a gas station is in conformance with this designation.
2. The proposed project is compatible with the surrounding land uses; would not be detrimental to public health, safety or welfare; is on a site of adequate size and shape to accommodate the required development; and is adequately served by transportation and other infrastructure.
3. The proposed project conforms to the requirements of CEQA.

BACKGROUND

On July 11, 2011, the applicant, Victor Yateo for Moe's Stop, requested a Conditional Use Permit to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station on a 0.51 gross-acre site. The Zoning Ordinance requires a Conditional Use Permit for the gas station expansion in the CP-Commercial Pedestrian Zoning District. This permit also functions as a Site Development Permit to address new construction.

The applicant had previously filed a Conditional Use Permit application in 2009, File No. CP09-015, and an Initial Study/Negative Declaration (ND) was prepared for the project by the City of San Jose. That application was approved by the City Council on appeal on June 15, 2011. A neighboring business sued the City alleging that an EIR was required, rather than an ND, because the project may have a significant impact on traffic at the intersection of 33rd Street and McKee and on the soils due to a historical gasoline leak from an underground tank there. The case was heard by the California Superior Court for Santa Clara County on March 11, 2011 (case no. 1-10-CV-176412). On March 29, 2011, the court issued a Writ of Mandate requiring the City to prepare an Environmental Impact Report (EIR) for the project to evaluate traffic impacts. The court did not find the ND's hazardous materials analysis inadequate under CEQA. The previous file for the subject project, CP09-015, was deemed voided, since the permit did not have adequate CEQA clearance once the court invalidated the ND prepared for the project. The applicant subsequently filed the subject Conditional Use Permit application, File No. CP11-049, and an EIR for the project was prepared in accordance with the requirements of the Writ.

The existing gas station includes a 1,408 square-foot building used for auto servicing and a small store with a cashier. There are three existing gas dispensers on the site, with the two front dispensers along McKee Road being located under a 900-square-foot canopy. The gas station is accessed from two driveways on McKee Road to the north and two driveways on North 33rd Street to the west. The subject site is surrounded by commercial uses to the north, east, and west and by single-family residential uses to the south.

Project Description

The project includes the following components:

- a. Demolition of the existing single-family residence at 280 North 33rd Street.
- b. The addition of three new fueling dispensers along the west side of the site with a new 1,800 square foot canopy above.
- c. Closure of one driveway along North 33rd Street.
- d. Relocation of the other driveway on North 33rd Street further to the south.

- e. Reconfiguration of the driveway access on McKee Road closest to the intersection to be a one way exit only.
- f. Provision for associated site improvements (landscaping, parking, etc.).

The facility currently has a license from the State Department of Alcoholic Beverage Control (ABC) for the off-sale of beer and wine. No Conditional Use Permit exists for the use because the license has existed for the site prior to the requirement for a Conditional Use Permit for the off-sale of alcohol and is legal non-conforming as to the CUP requirement for the off-sale of alcohol. The proposed project will have no effect on the ongoing legal non-conforming status of the off-sale of alcohol use.

Community Engagement

A community meeting was held for the project with the previous submittal for the proposed use on July 28, 2009 in conjunction with the Five Wounds/Brookwood Terrace NAC. Approximately sixteen people attended the meeting, consisting of nearby residents. The residents expressed concerns over traffic in the area, as well as pedestrian safety with the close proximity to Route 101. However, the meeting attendees largely seemed to support the project as it seemed it would provide some improvements to the traffic circulation and pedestrian safety by limiting the driveway cuts and improving sidewalks and crosswalks.

ANALYSIS

The primary issues analyzed for this project include the following: 1) compliance with the requirement of the California Environmental Quality Act (CEQA), 2) conformance with the San Jose 2020 General Plan, 3) conformance with the applicable development standards in the Zoning Ordinance, 4) consistency with the Commercial Design Guidelines, and 5) consistency with the goals of sustainable development. These issues are the same as those identified under the previous proposal considered under File No. CP09-015. This project is identical to the previous proposal in terms of uses, site design, and architecture.

Environmental Review

As discussed above in the Background section of this staff report, the California Superior Court for Santa Clara County on March 29, 2011 (case no. 1-10-CV-176412) issued a Writ of Mandate requiring the City to prepare an EIR for the subject project to evaluate traffic impacts. The EIR for this project was prepared in accordance with the requirements of the Writ.

A Notice of Preparation of the EIR was circulated to the public and public agencies from June 28, 2011 to July 28, 2011. This Draft EIR was circulated for agency and public review during a 45-day public review period prior to certification of the document by the lead agency. The circulation period for the Draft EIR was from September 1, 2011 through October 17, 2011.

The Draft EIR is a Focused EIR, meaning that an Initial Study was first prepared to narrow the focus of review to those topic areas where there is a possibility of a significant environmental impact. The Initial Study is included as Appendix A of the Draft EIR. The only topic area identified where there could be a significant environmental impact was transportation, due to the issuance of the Writ, which is discussed in the Environmental Setting, Impacts, and Mitigation sections of the EIR.

Comments received on the Draft EIR will be provided to the Planning Commission under separate cover as part of the First Amendment to the Draft EIR. The Final EIR for the project consists of the Draft EIR together with responses to comments received contained in the First Amendment.

The decision-making body must certify that it has reviewed and considered the information in the Final EIR and that the EIR has been completed in conformity with the requirements of CEQA. Although the Final EIR does not control the lead agency's ultimate decision on the project, the City must consider the information in the Final EIR and respond to each significant effect identified in the Final EIR. If significant adverse environmental effects are identified in the Final EIR, approval of the project must be accompanied by written findings.

In this case, the EIR identified no significant environmental impacts of the project, and no new significant environmental issues or impacts were raised in the preparation of the First Amendment to the EIR. As a result, there are no mitigation measures to be proposed, since there are no significant environmental impacts to mitigate. Similarly, because there were no significant, unavoidable environmental impacts identified, there is no need for the Planning Commission, or the City Council on appeal, to adopt a statement of overriding considerations.

Both the Draft EIR and the First Amendment will be provided to the Planning Commission under separate transmittal. The information contained in those documents is incorporated into this memorandum at this point as if it were fully set forth in this memorandum.

General Plan Conformance

The project is consistent with the site's General Plan Land Use/Transportation Diagram designation of General Commercial. A gas station is a retail operation in conformance with this designation. The proposed Conditional Use Permit supports the implementation of the Economic Development Major Strategy of the General Plan by facilitating the investment and expansion of an existing business within the existing urban environment of the City.

Conformance with the Zoning Ordinance Development Standards

The site is located in the CP-Commercial Pedestrian Zoning District, which has no minimum front setback requirement, but has a maximum front setback of 10 feet. The new construction on the site is for the fueling canopy along North 33rd Street. The fueling canopy is set back approximately six feet from the property line, which conforms to the Zoning Code. There is also a 25-foot rear setback for the CP-Commercial Pedestrian Zoning District. The new fueling canopy is set back more than 60 feet from the rear property line.

The proposed new construction, which includes the net addition of three new gasoline dispensers and the construction of a new fueling canopy, would not create any additional parking demand per the Zoning Code. The proposal would result in the addition of four parking spaces for customers, including the relocation of the water and air service to a site that interferes less with circulation. The project would also expand the size of the parking area used for vehicles associated with the vehicle servicing facility.

Conformance with Commercial Design Guidelines

The proposed site plan is consistent with the Commercial Design Guidelines for a service station in terms of site organization, building location and design, parking, and site circulation.

Consistent with the Commercial Design Guidelines, the applicant is proposing a reduction in the number of driveways that connect to the street. The current configuration has two driveways on each frontage along McKee Road and North 33rd Street. The two existing driveways on North 33rd Street are being closed and a new single driveway cut is being provided further south on North 33rd Street. The driveway on McKee Road closest to the intersection would be reconfigured to allow for egress from the site only, which should improve traffic safety at the intersection. The closure of the driveways on North 33rd Street would also allow for the provision of a small landscape island at the street corner of the site. The setbacks proposed for the canopy and fuel dispensers are consistent with the setbacks recommended by the Commercial Design Guidelines. All of the structures on the site are generally architecturally consistent, as the site continues to upgrade to become more modern.

Based on the above analysis, staff concludes that the proposed use is consistent with the intent of the Commercial Design Guidelines and represents a significant improvement in the function and appearance of the site as compared to that of the existing facility.

Sustainability

The City Council adopted the Green Building Ordinance (No. 28622) on June 23, 2009 which establishes standards intended to advance greenhouse gas reduction and other sustainability strategies outlined in the City's Green Vision and Council Policy 6-32. Council Policy 6-32 requires that applicable projects achieve minimum green building performance levels using adopted reference standards specified in the policy. The proposed project is not subject to the City's Green Building Policy and Ordinance because the project does not involve new construction of more than 20,000 square feet. The project does conform to the water quality requirements of City Council Policy 6-29: Post-Construction Urban Runoff Management.

CONCLUSION

The proposed Conditional Use Permit will allow the expansion and upgrade of the existing gas station. The new project will improve the design of the existing buildings and structures on the site, as well as expand the amount of service the site can offer by adding additional gas pumps. The closure of driveways along North 33rd Street and reconfigurations of the driveway cuts along McKee Road will improve vehicular and pedestrian safety around the site. The proposed perimeter landscaping would also improve the streetscape.

A Final EIR identified no significant impacts from the proposed project. As a result, there are no mitigation measures needed to modify the proposed project. In sum, no project design changes are required to address the concerns raised through comments on the Final EIR.

PUBLIC OUTREACH

In addition to the community meeting held as part of the original permit application, a sign was posted on-site to notify neighbors of the proposed development. A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site and posted on the City website. This staff report is also posted on the City's website. Staff has been available to respond to questions from the public.

As part of the EIR process, additional public outreach was conducted through public noticing in compliance with State law. A Notice of Preparation of the EIR was circulated to the public and public agencies from June 28, 2011 to July 28, 2011. The Draft EIR was circulated for agency and public review during a 45-day public review period prior to certification of the document by the lead agency. The circulation period for the Draft EIR was from September 1, 2011 through October 17, 2011.

Environmental concerns raised by members of the public are discussed above under the Environmental Review section of this staff report.

Project Manager: Jenny Nusbaum **Approved by:**  **Date:** 10/21/2011

Owner:	Applicant:	Attachments:
Amir Shirazi 1604 McKee Road San José, CA 95116	Victor Yatco VBY Services 2625 Timberlake Court San Jose, CA 95148	Draft Resolution Draft EIR Resolution Plans

RESOLUTION NO. _____

A resolution of the Planning Commission of the City of San José approving a request for a Conditional Use to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station on a 0.51 gross-acre site on the southeast corner of McKee Road and North 33rd Street (1604 McKee Road), San José, and adopting a related Focused Environmental Impact Report for the project.

FILE NO. CP11-049

BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSÉ:

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, a Conditional Use Permit, Permit Application (CP11-049) was filed on July 11, 2011 to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station on that certain real property (hereinafter referred to as "subject property"), situate in the CP-Commercial Pedestrian Zoning District, located on the southeast corner of McKee Road and North 33rd Street (1604 McKee Road), San José, California; and

WHEREAS, the subject property is all that real property described in Exhibit "A", which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, at said hearing, Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting this matter; and

WHEREAS, at said hearing, this Planning Commission received and considered the reports and recommendation of the staff; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Proposed Expansion of Moe's Stop Gas and Service Station," last revised October 5, 2011, said plan is on file in the Department of Planning and is available for inspection by anyone interested therein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, at said hearing, the Planning Commission also received in evidence that a certain Focused Environmental Impact Report was prepared for the project; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this Planning Commission;

NOW, THEREFORE:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram. The proposed use is consistent with this designation.
2. The site is currently zoned CP-Commercial Pedestrian.
3. The site is 0.51 gross acres in size.
4. The applicant is requesting a Conditional Use Permit to allow the demolition of an existing single-family detached residence and the expansion of an existing gas and service station on a 0.51 gross-acre site on the southeast corner of McKee Road and North 33rd Street (1604 McKee Road).
5. The subject single-family residence was built in 1941 with an addition constructed in 1948.
6. The subject single-family residence is not considered historically significant, nor is it identified in the City's Historic Resources Inventory.
7. The project includes the following components:
 - a. Demolition of the existing single-family residence and associated accessory structures at 280 North 33rd Street.
 - b. The addition of three new fueling dispensers along the west side of the site with a new 1,800 square foot canopy above.
 - c. Closure of one driveway along North 33rd Street.
 - d. Relocation of the other driveway on North 33rd Street further to the south.
 - e. Reconfiguration of the driveway access on McKee Road closest to the intersection to be a one way exit only.
 - f. Provision for associated site improvements (landscaping, parking, etc.).
8. The proposed expansion will not result in an increase in the parking demand on site.
9. The existing store is legal non-conforming for the off-sale of alcohol. No changes are proposed to the store.
10. The subject site is surrounded by commercial uses on the north, east and west, and by single-family residential uses to the south.
11. The project proposes the removal of 15 trees, none of which are ordinance sized.
12. Per Table 20-140 of the San José Municipal Code, a Conditional Use Permit is required for a gasoline service station use in the CP-Commercial Pedestrian Zoning District.

13. The gas station operates from 6:00 a.m. to 11:00 p.m.
14. An Initial Study/Negative Declaration (ND) was prepared for the project by the City of San Jose in 2009. A neighboring business sued the City on the grounds that the ND did not adequately address traffic.
15. The case went to the California Superior Court for Santa Clara County on March 11, 2011 (case no. 1-10-CV-0176412).
16. The court issued a Writ of Mandate requiring the City to prepare an EIR for the project, specifically to evaluate traffic impacts. The EIR for this project was prepared in accordance with the requirements of the Writ.
17. A Notice of Preparation of the EIR was circulated to the public and public agencies from June 28, 2011 to July 28, 2011. This Draft EIR was circulated for agency and public review during a 45-day public review period prior to certification of the document by the lead agency. The circulation period for the Draft EIR ran from September 1, 2011 through October 17, 2011.
18. The Draft EIR is a Focused EIR, meaning that an Initial Study was first prepared to narrow the focus of review to those topic areas where there is a possibility of a significant environmental impact. The Initial Study is included as Appendix A of the Draft EIR. The only topic area identified where there could be a significant environmental impact was Transportation, which is discussed in the Environmental Setting, Impacts, and Mitigation section of the EIR.
19. The decision-making body must certify that it has reviewed and considered the information in the Final EIR and that the EIR has been completed in conformity with the requirements of CEQA. Although the EIR does not control the lead agency's ultimate decision on the project, the City must consider the information in the EIR and respond to each significant effect identified in the EIR. If significant adverse environmental effects are identified in the EIR, approval of the project must be accompanied by written findings.
20. The EIR identified no significant impacts. Because no significant impacts were identified, there are no mitigation measures proposed. Similarly, because there were no significant, unavoidable environmental impacts identified, there is no need for the Planning Commission, or the City Council on appeal, to adopt a statement of overriding considerations.

FINDINGS

The Planning Commission finds based on the stated facts that:

1. The interrelationship between the orientation, location and elevations of the proposed building and structure and other uses on-site are mutually compatible and aesthetically harmonious in that:
 - a. The architectural elements of the proposed structure are integrated into a harmonious whole.
 - b. The proposed structure is comparable in terms of mass, scale, and height.

- c. Sufficient maneuvering room will be provided on site to allow smooth circulation and minimize interference with other uses.
 - d. Parking spaces are conveniently located in relation to the uses they support.
- 2. The orientation, location and elevation of the proposed building and structure and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood in that:
 - a. The structure proposed on site is comparable in terms of mass, scale, and height with existing adjacent or nearby structures.
 - b. The proposed structure does not unreasonably interfere with the light and air available to adjacent sites.
 - c. The use of the site will not interfere with the use of adjacent properties since sufficient buffering between uses will be provided.
- 3. The environmental impacts of the project will not have an unacceptable negative effect on adjacent property or properties in that:
 - a. An Initial Study/Negative Declaration (ND) was prepared for the project by the City of San Jose in 2009. A neighboring business sued the City on the grounds that the ND did not adequately address traffic. The case went to the California Superior Court for Santa Clara County on March 11, 2011 (case no. 1-10-CV-0176412). The court issued a Writ of Mandate requiring the City to prepare an EIR for the project, specifically to evaluate traffic impacts.
 - b. The EIR for this project was prepared in accordance with the requirements of the Writ.
 - c. The only topic area identified where there could be a significant environmental impact was Transportation, which is discussed in the Environmental Setting, Impacts, and Mitigation section of the EIR.
 - d. The EIR identified no significant impacts. Because no significant impacts were identified, there are no mitigation measures proposed. Similarly, because there were no significant, unavoidable environmental impacts identified, there is no need for the Planning Commission, or the City Council on appeal, to adopt a statement of overriding considerations.
- 4. Landscaping, irrigation systems, walls and fences, features to conceal outdoor activities, exterior heating, ventilating, plumbing, utility and trash facilities are sufficient to maintain or upgrade the appearance of the neighborhood in that:
 - a. Landscaping will be added to the site and an adequate automatic irrigation system will be provided to support this landscaping.
 - b. Outdoor activities, exterior heating, ventilating, plumbing, utility, and trash facilities will be screened by parapets, fences, walls or other devices compatible with the architectural treatment of the structure.
- 5. Traffic access, pedestrian access and parking are adequate in that:
 - a. Sufficient driveway curb cuts and driveways will be provided on site to provide access to the site without interfering with off-site circulation.

- b. Pedestrian walkways will be provided to all major building entrances.
 - c. The proposed number and size of parking spaces complies with the requirements of the Zoning Ordinance.
6. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram and this application is consistent with this designation.
7. The Planning Commission has considered all of the following criteria in evaluating the proposed demolition.
- a. The failure to approve the permit would result in the creation of continued existence of a nuisance, blight, or dangerous condition.
 - b. The failure to approve the permit would jeopardize public health, safety or welfare.
 - c. The approval of the permit should maintain the supply of commercial space in the City of San José
 - d. Both inventoried and non-inventoried buildings, sites and districts of historical significance should be preserved to the maximum extent feasible.
 - e. Rehabilitation or reuse of the existing building would not be feasible.
 - f. The approval of the demolition of the building should facilitate a project which is compatible with the surrounding neighborhood.
 - g. The demolition of the building without an approved replacement building should not have an adverse impact on the surrounding neighborhood.
8. The benefits of permitting the demolition, removal or relocating of the subject structures outweigh the impacts of the demolition, removal or relocation.

Further, based on the above facts and findings, the Planning Commission finds that:

- 1. The proposed project conforms to the City's General Plan.
- 2. The proposed project conforms to the San José Zoning Ordinance.
- 3. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based on the above facts and findings, the Planning Commission finds that:

- 1. The proposed use at the location requested will not:
 - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; or
 - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
 - c. Be detrimental to public health, safety or general welfare; and

2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this Title, or as is otherwise required in order to integrate said use with the uses in the surrounding area; and
3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quantity of traffic such use would generate; or by other forms of transit adequate to carry the kind and quantity of individuals such use would generate; and
 - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS

1. **Acceptance of Permit.** Per Section 20.100.290(B), should the applicant fail to file a timely and valid appeal of this Permit within the applicable appeal period, such inaction by the applicant shall be deemed to constitute all of the following on behalf of the applicant:
 - a. Acceptance of the Permit by the applicant; and
 - b. Agreement by the applicant to be bound by, to comply with, and to do all things required of or by the applicant pursuant to all of the terms, provisions, and conditions of this permit or other approval and the provisions of Title 20 applicable to such Permit.
2. **Permit Expiration.** This Conditional Use Permit shall automatically expire four years from and after the date of issuance hereof by said Planning Commission, if within such four-year time period, the construction of the new fuel pumps and canopy has not commenced, pursuant to and in accordance with the provision of this Conditional Use Permit. The date of issuance is the date this Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment/Amendment to extend the validity of this Permit in accordance with Title 20.
3. **Building Permit/Certificate of Occupancy.** Procurement of a Building Permit and/or Certificate of Occupancy from the Building Official for the structures described or contemplated under this permit shall be deemed acceptance of all conditions specified in this permit and the applicant's agreement to fully comply with all of said conditions. No change in the character of occupancy or change to a different group of occupancies as described by the "Building Code" shall be made without first obtaining a Certificate of Occupancy from the Building Official, as required under San José Municipal Code Section 24.02.610, and any such change in occupancy must comply with all other applicable local and state laws.

4. **Conformance with Plans.** The use development shall conform to approved plans entitled, "Proposed Expansion of Moe's Stop Gas and Service Station," last revised October 5, 2011 on file with the Department of Planning, Building and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
5. **Compliance with Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance.
6. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
7. **Operations Plan.** Loitering is prohibited on or around the premises or the area under the control of the applicant licensee(s). No alcoholic beverages shall be consumed on any property adjacent to the premises over which the project developer/applicant has control. The project developer/applicant shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
8. **Outside Storage.** No outside storage is permitted except in areas designated on the approved plan set.
9. **Tree Removals.** This permit approves the removal of 15 trees, none of which are ordinance sized trees. All non-orchard trees that are to be removed shall be replaced at the following ratios:
 - a. Each tree less than 12 inches in diameter to be removed shall be replaced with one 15-gallon tree.
 - b. Each tree 12 inches to 17 inches in diameter to be removed shall be replaced with two 15-gallon trees.
 - c. Trees 18 inches in diameter or greater to be removed shall be replaced with four 24-inch box trees.

Any future tree removals shall be deemed a change to the approved landscape plan and shall require approval by the Director of Planning, Building, and Code Enforcement.
10. **Hours of Operation.** This permit does not allow for 24 hour operation. Standard hours of operation are from 6:00 a.m. to 12:00 Midnight.
11. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.

12. **Lighting.** All proposed lighting shall conform to the City of San José's Outdoor Lighting Policy. Under canopy lighting shall be recessed and/or screened to avoid light intrusion on nearby residential properties.
13. **Archaeology.** Pursuant to Section 7050.5 of the Health and Safety Code, and Section 5097.94 of the Public Resources Code of the State of California in the event of the discovery of human remains during construction, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains. The Santa Clara County Coroner shall be notified and shall make a determination as to whether the remains are Native American. If the Coroner determines that the remains are not subject to his authority, he shall notify the Native American Heritage Commission who shall attempt to identify descendants of the deceased Native American. If no satisfactory agreement can be reached as to the disposition of the remains pursuant to this State law, then the land owner shall re-inter the human remains and items associated with Native American burials on the property in a location not subject to further subsurface disturbance.
14. **Construction Measures.** The applicant shall ensure that the following construction measures are fully implemented throughout the duration of construction activities associated with this project. For the purposes of this Permit, "construction" shall mean all on-site activities including site clearing, grading, and construction. Failure to comply with these conditions by the applicant, project contractors or subcontractors shall be cause for shutdown of the project site until compliance with the following conditions can be ensured by the City.
 - a. **Measure:** These construction measures shall be included in all contract documents for the project to ensure full disclosure to contractors and subcontractors.
 - b. **Equipment:** Reduction of construction phase noise at the site shall include the use of quiet or "new technology" equipment, particularly with improved exhaust mufflers. All internal combustion engines used at the project site shall be equipped with the type of muffler recommended by the equipment manufacturer. In addition, all equipment shall be maintained in good mechanical condition so as to minimize noise created by faulty or poorly maintained engine, drive-train and other components.
 - c. **Construction Hours:** Construction shall be limited to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday for any onsite or offsite work within 500 feet of any residential unit so as to avoid the more sensitive evening, nighttime and weekend hours.
 - d. **Construction Deliveries:** Deliveries shall not occur outside the above construction hours. All deliveries shall be coordinated to ensure that no delivery vehicles arrive prior to the opening of the gates to prevent the disruption of nearby residents.
 - e. **Plans:** The construction hours shall be printed on all plans for the project used to construct the project.
 - f. **Fencing:** The site shall be wholly enclosed by security fencing. The gates to the project site shall remain locked during all other times, except for a fifteen-minute period immediately preceding and following the above hours of construction.
 - g. **Construction Employees:** Construction workers shall not arrive to the site until the opening of the project gates. The applicant shall designate a location without adjacent residential units for workers to wait prior to the opening of the project gates.

- h. **Construction Activities:** Construction equipment, materials, and workers shall not be staged on any area of the site within 50 feet of an adjoining property used for residential purposes unless the Director of Planning approves a Permit Adjustment authorizing such activity. The construction staging area shall not create a public or private nuisance.
 - i. **Disturbance Coordinator:** A disturbance coordinator shall be identified by the developer for this project. The disturbance coordinator shall be responsible for ensuring compliance with the hours of construction, site housekeeping, and other construction-related conditions in this permit.
 - j. **Daily Log:** The disturbance coordinator shall maintain a log of daily activities on the project, including but not limited to, verification of site closure activities, project cleanliness, complaints on site activities and conditions and dates and times of the coordinators visits to the project if the coordinator is not solely responsible for this project site. This log shall be available for inspection by City Staff upon request.
 - k. **Telephone Contact:** A phone with answering machine for complaints or other communication during non-work hours shall be maintained during the duration of project construction. The phone number should be a local call for surrounding residents.
 - l. **Signage:** The name and phone number of the disturbance coordinator, the hours of construction limitations, the project contact telephone number, City File Number CP11-049, city contact and phone number (department and phone number) shall be displayed on a weatherproof sign posted at each entrance to the project site.
15. **Dust Control/Air Quality.** Project construction shall implement the Bay Area Air Quality Management District's list of feasible construction dust control measures. The following construction practices shall be implemented during all phases of construction on the project site:
- a. Water all active construction areas at least twice daily or as often as needed to control dust emissions.
 - b. Cover all trucks hauling soil, sand, and other loose materials and/or ensure that all trucks hauling such materials maintain at least two feet of freeboard.
 - c. Apply water three times daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas and staging areas during construction of the site.
 - d. Sweep daily or as often as needed with water sweepers all paved access roads, parking areas and staging areas at construction sites to control dust.
 - e. Sweep public streets daily, or as often as needed, with water sweepers, to keep streets free of visible soil material.
 - f. Hydro seed or apply (non-toxic) soil stabilizers to inactive construction areas (previously graded areas inactive for ten days or more).
 - g. Enclose, cover, water twice daily or apply non-toxic soil binders to exposed stockpiles (dirt, sand, etc.) sufficient to prevent visible airborne dust.
 - h. Install sandbags or other erosion control measures to prevent silt runoff to public roadways.

- i. Replant vegetation in disturbed areas as quickly as possible.
16. Public Works Clearance for Building Permit(s) or Map Approval: Prior to the approval of the Tract or Parcel Map (if applicable) by the Director of Public Works, or the issuance of Building permits, whichever occurs first, the applicant will be required to have satisfied all of the following Public Works conditions. The applicant is strongly advised to apply for any necessary Public Works permits prior to applying for Building permits.
- a. **Minor Improvement Permit:** The public improvements conditioned as part of this permit require the execution of a Minor Street Improvement Permit that guarantees the completion of the public improvements to the satisfaction of the Director of Public Works. This permit includes privately engineered plans, insurance, surety deposit, and engineering and inspection fees.
 - b. **Grading/Geology:** A grading permit will be required prior to the issuance of a Public Works Clearance. The construction operation shall control the discharge of pollutants (sediments) to the storm drain system from the site. An erosion control plan may be required with the grading application.
 - c. **Stormwater Runoff Pollution Control Measures:** This project must comply with the City's Post-Construction Urban Runoff Management Policy (Policy 6-29), which requires implementation of Best Management Practices (BMPs) that include site design measures, source controls, and stormwater treatment controls to minimize stormwater pollutant discharges. Post-construction treatment control measures, shown on the project's Stormwater Control Plan, shall meet the numeric sizing design criteria specified in City Policy 6-29. The project's Stormwater Control Plan and numeric sizing calculations have been reviewed and this project will be in conformance with City Policy 6-29. Final inspection and maintenance information on the post-construction treatment control measures must be submitted prior to issuance of a Public Works Clearance.
 - d. **Street Improvements:**
 - i. Owner shall irrevocably dedicate the necessary right-of-way (approximately 22 feet) along McKee Road to accommodate an ultimate right-of-way of 130 feet.
 - ii. The Owner shall be responsible for relocating the existing pumps, canopy, fuel tank, landscaping and other existing improvements within the dedication area prior to the start of construction of the future McKee Road widening project upon written notice from the City.
 - iii. Remove and replace broken or uplifted curb, gutter, and sidewalk along project frontage.
 - iv. Remove and replace the existing full access driveway on McKee Road closest to the intersection of McKee Road and North 33rd Street with a 16-foot wide, one-way, right-turn-exit-only driveway.
 - v. Proposed driveway width for the new driveway on North 33rd Street shall be 26 feet.
 - vi. Install a City-standard handicap ramp at the corner of McKee Road to serve both the crosswalks crossing McKee Road and North 33rd Street. Relocate existing inlet and re-stripe crosswalks as needed.

- vii. Dedication and improvement of the public streets shall be to the satisfaction of the Director of Public Works.
 - viii. Repair, overlay, or reconstruction of asphalt pavement may be required. The existing pavement will be evaluated with the street improvement plans and any necessary pavement restoration shall be included as part of the final street improvement plans.
 - e. **SNI:** This project is located within the Five Wounds/Brookwood Terrace SNI area. Public improvements shall conform to the approved EIR and neighborhood improvement plan.
 - f. **Electrical:**
 - i. Existing electroliers along the project frontage will be evaluated at the public improvement stage and any street lighting requirements shall be included on the public improvement plans.
 - ii. Locate and protect existing electrical conduit in driveway construction.
 - iii. Provide clearance for electrical equipment from driveways, and relocate driveway or electrolier. The minimum clearance from driveways is 10 feet in commercial areas and 5 feet in residential areas.
 - g. **Street Trees:** The locations of the street trees will be determined at the street improvement stage. Street trees shown on this permit are conceptual only. Contact the City Arborist at (408) 277-2756 for the designated street tree. Install street trees within public right-of-way along entire project street frontage per City standards; refer to the current "Guidelines for Planning, Design, and Construction of City Streetscape Projects". Street trees shall be installed in cut-outs at the back of curb. Obtain a DOT street tree planting permit for any proposed street tree plantings.
17. **Demolition.** A building permit is required for the demolition of the house. The structures to be removed shall be surveyed for the presence of asbestos-containing materials at the demolition permit stage; and if any suspect ACM are present, they will be sampled prior to demolition in accordance with NESHAP guidelines, and all potentially friable ACM will be removed prior to building demolition and disposed of by offsite burial at a permitted facility in accordance with NESHAP, Cal-OSHA and BAAQMD requirements. The structures to be removed shall be surveyed for the presence of lead based paint at the demolition permit stage; and if any suspect LBP is present, it will be sampled prior to demolition, and all potential LBP will be removed prior to building demolition and disposed of by offsite burial at a permitted facility in accordance with EPA and OSHA requirements.
18. **Building Clearance for Issuing Permits.** Prior to the issuance of a Building Permit, the following requirements must be met to the satisfaction of the Chief Building Official:
- a. **Construction Plans:** This permit file number, CP11-049, shall be printed on all construction plans submitted to the Building Division.
 - b. **Emergency Address Card:** The project developer shall file an Emergency Address Card, Form 200-14, with the City of San José Police Department.
 - c. **Americans With Disabilities Act:** The applicant shall provide appropriate access as required by the Americans With Disabilities Act (ADA).

- d. **Street Number Visibility:** Street numbers of the buildings shall be easily visible at all times, day and night.
 - e. The property line must be removed or relocated if the trash enclosure crosses the property line.
19. **Fire Clearance.** A Fire Clearance shall be obtained from Fire Chief (408) 535-3555) prior to the issuance of a building permit.
20. **Fire Hydrants.** Public (off-site) and private (on-site) fire hydrants shall be provided as approved and at the exact location specified by Protection Engineering Section of the Fire Department to the satisfaction of the Fire Chief.
21. **Landscaping.** Planting and irrigation are to be provided, as indicated, on the final Approved Plan Set. Landscaped areas shall be maintained and watered and all dead plant material is to be removed and replaced by the property owner. Irrigation is to be installed in accordance with Part 4 of Chapter 15.10 of Title 15 of the San José Municipal Code, Water Efficient Landscape Standards for New and Rehabilitated Landscaping and the City of San José Landscape and Irrigation Guidelines.
22. **Irrigation Standards.** The applicant shall install an adequately sized irrigation distribution system with automatic controllers in all areas to be landscaped that conforms to the Zonal Irrigation Plan in the Approved Plan Set and is consistent with the City of San José Landscape and Irrigation Guidelines. The design of the system shall be approved and stamped by a California Registered Landscape Architect.
23. **Certification.** Pursuant to San José Municipal Code, Section 15.10.486, certificates of substantial completion for landscape and irrigation installation shall be completed by licensed or certified professionals and provided to the Department of Planning, Building and Code Enforcement prior to approval of the final inspection of the project.
24. **Recycling.** It is required that scrap construction and demolition debris be recycled instead of disposing of it in a landfill. An infrastructure exists within San José to accommodate such recycling efforts. Integrated Waste Management staff can provide assistance on how to recycle construction and demolition debris from the project, including information on where to conveniently recycle the material. Additional information may be found at <http://www.sjrecycles.org/construction-demolition/cddd.asp> or by contacting the Commercial Solid Waste Program at (408) 535-8550.
25. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
- a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
 - c. The use as presently conducted creates a nuisance.

In accordance with the findings set forth above, a Conditional Use permit to use the subject property for said purpose specified above is hereby approved.

APPROVED and issued this 2nd day of November 2011, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Chairperson

ATTEST:

Joseph Horwedel, Secretary

Deputy

NOTICE TO PARTIES

The time within which judicial review must be sought to review this decision is governed by the provisions of the California Code of Civil Procedure Section 1094.6.

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October 17, 2011

Via Email (john.davidson@sanjose.ca.gov)
and Fax (408-292-6055)

Mr. John Davidson
Senior Planner
Department of Planning, Building
and Code Enforcement
200 E. Santa Clara Street, 3rd Floor
San Jose, California 95113

Re: City File No. CP11-049 (formerly CP09-115)
Draft EIR for Moe's Stop Gas & Service Station

Dear Mr. Davidson:

This office represents Andy Saberi, property owner and business owner, and Andy's BP, Inc., dba Gas & Shop (hereinafter "Andy's BP"), located at the southwest corner of McGee Road on N. 33rd Street, across the street from Moe's Gas, applicant in the above-referenced proceeding. This office also represents the same parties in the case against the City of San Jose, as Respondent; and Mr. Amir Shirazi, et al., real parties in interest, in the Superior Court of the State of California for the City and County of Santa Clara, Case No. 110 CV 176412.

Andy's BP objects to the "Draft" EIR based upon the following:

1. The EIR erroneously omits review of the applicant's leaking underground fuel tanks;
2. The EIR erroneously relies on false data re traffic analysis;
3. The EIR erroneously fails to address the applicant's failure to comply with state and local laws.

A. The EIR is Flawed: No Analysis of the Leaky Underground Tanks.

- 1. The Applicant's Leaky Underground Fuel Tanks Was Addressed
in Andy's BP Petition for Writ of Mandate.**

Petitioner's reply brief in support of the Verified Petition for Writ of Mandate, stated, in part, as follows:

On August 13, 2009, the County of Santa Clara sent a letter to Shirazi regarding a fuel leak investigation at Moe's Stop. (SJ 87) The letter refers to the fact that Moe's Station was a site where fuel leaks had occurred, i.e., a "fuel leak site." (SJ 87; emphasis added)

The site of the Project was on the "LUST" (Leaking Underground Storage Tanks) list, i.e., a site with issues regarding soil contamination involving leakage of underground gasoline storage tanks. (SJ 107) At a meeting, Respondent's staff member stated, *"...I did some further investigation into it and it appears that there still are kind of issues going on with that, so, basically, as an active-active leaking underground storage tank site, while development on the property can still proceed, it is true that we cannot find this to be exempt from CEQA, so that we—the staff—the applicant would need to do some kind of environmental clearance, either a— you know, a negative declaration or, you know, if required, an EIR."* (SJ 107; emphasis added.) Respondent's staff speaker further stated, *"...I found, you know, a trail of—I guess he discussed correspondence from the Santa Clara County. I did, I believe, find the same correspondence he did. That was dated from June of this year, so, clearly there's still activity on the site with regard to the — to the leaking underground storage tank. So again, you know, it's not an issue that, you know, this development can't happen, it's just that the exemption will not cover it."* (SJ 108-109; emphasis added.)

On March 29, 2010, Respondent, through its representative Avril Baty, executed an initial study indicating that the Project would result in 41 net new average daily trips. (SJ 45) It further indicated that:

"The Municipal Environmental Compliance Officer and the Santa Clara County Department of Environmental Health have reviewed the soils report, and have determined that the groundwater at the site has been impacted by an historic release of gasoline,..." (SJ 41; emphasis added.)¹

On April 14, 2010, a supplemental memorandum was prepared regarding the Project, in relation to information received regarding an issue regarding a leaking underground fuel tank not originally identified by the Fire Department. (SJ 58)

¹ The opposition brief submitted by Respondent Shirazi fail to address the issue of Respondent's admission that "the site has been impacted by an historic release of gasoline." This admission alone is good grounds to require an EIR.

October 17, 2011

The letter from Petitioners' counsel states that substantial evidence supported the conclusion that significant impacts may occur, and as a consequence, an EIR was mandated. (SJ 65) [*"The substantial evidence clearly shows: (1) geology and soils may be impacted based upon applicant's leaking gasoline tanks; (b) hazards and hazardous materials may be impacted based upon applicant's leaking gasoline tanks; and (c) transportation/traffic may be impacted based upon the 'Generation Study' by Traffic Data Service. [p] 'If the Planning Commission simply believes an impact may occur, an EIR must be required. Applicable treatises and laws clearly mandate an EIR if an impact may occur. Here, applicant's history of 'out of compliance' with its underground tanks, coupled with the possible leaking, is sufficient to require an EIR. An impact may occur is sufficient to require an EIR. In addition, there can be no doubt based upon the TDS Study that traffic may be impacted. This is sufficient to require an EIR."* (SJ 65)].)

On April 21, 2010, a planning commission meeting was held. (SJ 119 et seq.) Based on the report of TDS, Mr. Dombroski argued that the Project would double traffic because Moe's Stop is a origin/destination in and of itself because it has the lowest gasoline prices in the area. (SJ 123) He noted that customers were observed waiting up to 15 minutes in line to use the station, negating the inference that customers arose from driving by the facility alone. (SJ 124) Thomas Saberl further stated at the meeting that Geotracker, a public website, failed to reflect that the site was in compliance with respect to underground gasoline leakage and contamination. (SJ 125) Mr. Saberl requested the commission order an EIR based on issues relating to traffic and contamination from leakage of gasoline. (SJ 125) At the conclusion of the meeting the application for conditional use permit was approved in light of the negative declaration and a finding it was in compliance with CEQA. (SJ 127-128)

2. The Expert Retained by Andy's BP Confirms Contamination Caused By Applicant.

The expert retained by Andy's BP is Bob Clark-Riddell. His resume is attached as Exhibit A (8 pages). Mr. Clark-Riddell's expert report is attached as Exhibit B (20 pages).

This is substantial evidence that significant impacts may occur and as a consequence, an EIR is mandated. For these reasons, the EIR is patently flawed.

B. The EIR Relies on False Data Regarding the Traffic Analysis.

At page 13 of the EIR, it states that "gas prices" at Andy's BP Gas & Shop are "comparable to Moe's Stop" and that "prices don't typically vary by one cent per gallon on a daily basis." These predicate facts in the EIR are false. In fact, studies by Andy's BP

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show that at least 2/3 of the time, Moe's Gas is cheaper and the prices vary by more than one cent per gallon.

At page 14 of the EIR, it refers to "pass-by trip reduction" for the proposition that traffic is not generated by the gas station. Application of this principle is wrong because the area has the distinction for "cheap gas", the cheapest in the San Jose metropolitan area. In fact, Moe's Stop advertises on a website that applicant's posts daily with his prices to obtain overflow traffic.

All of these facts were ignored in the EIR. Additionally, the EIR acknowledges at page 13 to 14 that it relies on these false assumptions. Accordingly, the EIR is patently flawed.

C. The EIR Fails to Address the Applicant's Failure to Comply With State and Local Laws.

An acknowledged condition for obtaining the conditional use permit, the applicant must be in compliance with all state and local laws. Here, applicant has violated state and local laws by failing to comply with the Court's Order and Judgment Granting Peremptory Writ of Mandate filed March 29, 2011. These violations are documented in the attached email to counsel for the City of San Jose and applicant's counsel, dated October 14, 2011, attached as Exhibit C.

It is clear that based upon the above, the City of San Jose, in concert with the applicant, have violated the fundamental constitutional due process rights of Andy's BP, entitling Andy's BP to pursue appropriate Court intervention in a federal civil rights complaint.

For these reasons, it is requested that the EIR be revised to address and evaluate the substantial impacts which may occur.

Very truly yours,

JAMES M. DOMBROSKI

JMD:sd



Bob Clark-Riddell, P.E.
President/Principal Engineer

EXPERIENCE AND SKILLS

Mr. Clark-Riddell has significant experience in the environmental and civil engineering field, featuring:

- Over 25 years of experience,
- Registration as a Civil Engineer in California,
- Emphasis in client interaction, project management and staff supervision,
- Coordination of a wide range of services for multiple clients,
- Extensive regulatory negotiation, cost recovery, and liability minimization experience, and
- Focus on soil and groundwater assessment/remediation/compliance sampling, fixed price remediation (with cleanup cost cap policies), Phase I & II environmental site assessments and due diligence, cleanup fund work, regulatory compliance, and litigation support/expert witness reporting.

Mr. Bob Clark-Riddell founded Pangea Environmental Services, Inc. to provide his clients with top quality, reliable and cost-effective environmental and engineering services. Mr. Clark-Riddell has over 25 years of experience, which includes his role as a co-founder of Cambria Environmental Technology, Inc., which he helped grow to more than \$11M in annual revenues, as well as tenures at Welss Associates, ICF/Kaiser Engineers, the U.S. Postal Service, and the Superior Electric Company. As Pangea's Owner/Principal Engineer, Mr. Clark-Riddell is responsible for all business development, technical work, and administration. Mr. Clark-Riddell works intimately with clients, staff, subcontractors and regulators. He trains and manages engineering staff, applies innovative remedial technologies, designs remediation programs, oversees engineering projects, and provides technical quality control. He has designed and supervised remediation projects at over 200 sites in California and has conducted numerous feasibility studies, corrective actions and cost evaluations. Most recently, Mr. Clark-Riddell has coordinated many property transaction and redevelopment projects, requiring extensive due diligence and regulatory interaction to negotiate risk-based cleanup standards, considering engineering/administrative controls, and pursuing case closure. He has also assisted with litigation support on several matters. He has experience with geotechnical evaluations, construction management, asbestos-related services, hazardous material management, industrial water/wastewater, stormwater compliance, and wetlands restoration.

EDUCATION

B.S., Mechanical Engineering, University of Pennsylvania, Philadelphia PA, 1985

Additional Studies:

Litigating Groundwater Cases-Plaintiff and Defendant Perspectives, Bar Assoc. of SF, CA, 2003

Management Action Program Workshop, Anaheim, CA, 2003

Environmental Forensics Workshop, Groundwater Resources Association, Emeryville, CA, 2002

Brownfields Forum, Tanner Insurance, San Ramon, CA, 2002

Litigation Support and Expert Witness Workshop, Oakland, CA, 2000

Civil Engineering Fundamentals, Bechtel Corporation, San Francisco, CA, 1991

Legal Aspects of Construction, University of California Extension, Berkeley, CA, 1990

Ground Water Remediation, University of California, Berkeley Extension, Berkeley, CA, 1990

Environmental Law and National Environmental Policy Act, U.S.D. Agriculture, Wash., DC, 1989

REGISTRATION AND AFFILIATIONS

Registered Civil Engineer (PE), State of California, No. C49629

National Society of Professional Engineers (NSPE)

Professional Environmental Marketing Association (PEMA)

Groundwater Resources Association (GRA)

Rotary Club of Oakland (#3)

EXHIBIT A

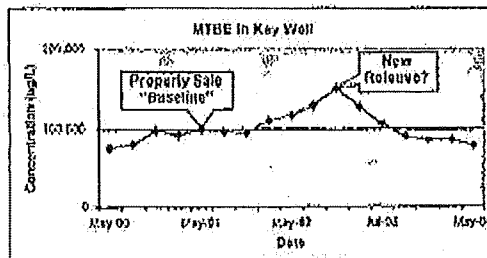
PROFESSIONAL HISTORY

- 2004 - Present **President/Owner/Principal Engineer, Pangea Environmental Services, Inc., Oakland, California;** Founder and principal engineer.
- 1994 - 2004 **Principal Engineer, Cambria Environmental Technology, Inc., Oakland, California;** Co-founder and principal engineer. As leader of the Investigation-Remediation Group and profit center for over five years, Mr. Clark-Riddell was responsible for managing a technical group of up to 16 staff to provide a wide range of services to numerous clients. Mr. Clark-Riddell was responsible for business development and technical work product and quality. The IR Group/profit center had annual revenues of approximately \$2M and 15% profitability. The primary services were Phase I & II environmental site assessments for due diligence/property transaction, assessment/remediation for UST cleanup fund projects, regulatory compliance, litigation support/expert witness reporting, and storm water monitoring. Contaminants were primarily petroleum hydrocarbons and chlorinated solvents, but also included interaction with U.S. EPA and California DTSC for metals contamination, Voluntary Cleanup Agreements, and Preliminary Endangerment Assessments.
- 1989 - 1994 **Project Engineer, Weiss Associates, Emeryville, California;** As lead engineer for a major oil company client, coordinated remediation projects for over 20 sites in Northern California. Supervised engineers, staff scientists and field technicians. Also worked on RI/FS and related reports for RCRA/CERCLA and U.S. DOE sites. Provided technical assistance for litigation support projects.
- 1986 - 1989 **Project Engineer, ICF Kaiser Engineers, Fairfax, Virginia;** Performed project management duties for environmental assessments, a feasibility study, and a site design guidelines study to comply with NEPA requirements. Also prepared procurement specifications, and inspected computerized industrial plant equipment for the Navy. Duties required coordination of nationwide vendors, vendor database, and personal inspection of equipment across the U.S. to confirm compliance with military procurement specifications.

REPRESENTATIVE PROJECTS AND EXPERIENCE

Environmental Litigation Support

Expert Testimony for Group of Service Station Owners: For a group of plaintiffs Mr. Clark-Riddell provided two long days of expert testimony to help preserve environmental indemnification and minimize environmental liability from alleged 'new' contamination. At issue was whether or not the new owners/operators had unauthorized releases that added to the known contamination at their sites. Observed concentration increases in site monitoring wells (primarily MTBE) are the focus of the litigation. Mr. Clark-Riddell reviewed site records and tank tightness testing to help document that the source of the increased concentrations was not the responsibility of the new owner. In some cases increased concentrations were explained by remediation system operation, or by fate and transport of known contamination. Constituent ratios, modeling, and forensic analyses are other tools used in dating site contamination. In addition to technical tasks, Mr. Clark-Riddell has been involved in regulatory interaction and discussion of strategic issues affecting the sites and the litigation. The case settled before trial. Settlement terms are confidential.



Expert Opinion Report and Deposition Testimony for former Boat Painting and Steel Coating Facility: Alameda, California - Prepared an expert report and provided expert testimony/deposition on behalf of a third-party defendant. Expert report presented five opinions supported by site data, project information, and industry literature. Reviewed numerous expert witness reports and depositions. At issue was soil and groundwater contaminated with PAHs, VOCs, and metals. The defendant had operated a wood treating facility from 1924 to 1968. The dispute involved three properties, two of which were owned by the plaintiff. The plaintiff alleged that chemical releases from the wood treating facility impacted his properties. The defendant filed counter claims and cross claims. Our client, a tenant on one of the properties, used coal tar pitch and coal tar epoxy resin, which contains PAHs. Our tenant also conducted steel sand blasting and painting, using paints and paint thinners and generated blast materials with metals. The expert report cost approximately 1/5th of the plaintiff's report cost, found unsubstantiated claims, and discovered several data points mistakenly located on incorrect property. Defendant obtained summary judgement on plaintiff's claim.

Expert Deposition Testimony regarding Inadequate Remediation of a Former Service Station Site: Oakland, California - Provided expert testimony/deposition on behalf of a plaintiff. Expert opinion provided on appropriateness of past, present and planned remedial efforts. Settlement allowed plaintiff to resume control (as lead administrator) of cleanup and obtain reimbursement from the State UST Cleanup Fund. With cleanup control, plaintiff has successfully accelerated cleanup efforts.

Mediation Assistance regarding Alleged Clean Water Act Violations from a Release at a Service Station Site: Richmond, California - On behalf of defendant, expedited site assessment to quickly fully delineate the contaminant extent in the site subsurface and help demonstrate that released compounds did not pose a significant risk to human health or the environment. Attended court-ordered mediation and presented documents related to site conditions and compliance actions conducted by defendant, which resulted in lowest settlement amount from the plaintiff (River Watch) as witnessed by the mediator.

Tidal Influence and Preferential Pathway Impact on Hydrocarbon Litigation: Oakland, California - For a large semi-public entity, Mr. Clark-Riddell coordinated a thorough subsurface evaluation of tidal impact on petroleum hydrocarbons. The goal of the work was to determine if storm drains were acting as conduits for contamination to the San Francisco Bay, and if bay water was affecting the fate and transport of known contamination. The results of this work are confidential.

Consultant Negligence Evaluation for Insurance Firm: South Lake Tahoe, California - On behalf of a leading environmental insurance company, Mr. Clark-Riddell evaluated the performance of an environmental consultant on an MTBE project near Lake Tahoe. Detailed review of public and private records was required to determine if the consultant performed within the 'standard of care' for the industry at the time.

Redevelopment and Imminent Domain (Taking): San Jose, California - When the San Jose Redevelopment Agency was 'taking' a property, Mr. Clark-Riddell was retained to quantify environmental liability related to residual contamination. The property owner and legal counsel desired to reduce the large discount on the property price attributed to the known contamination.

Litigation Support for Large Soil Excavation: Los Angeles, California - Prepared comments on cost appropriateness of \$6 million project for excavation of metal and hydrocarbon contamination at a former refining facility. Included a detailed evaluation of soil treatment and disposal options such as soil washing, metals neutralization, stabilization, pH control, capping, thermal treatment and insitu vitrification.

Litigation Support for Cost Apportionment: Homer Spit, Alaska - Performed technical review of case activities to determine cost apportionment for contractual cost sharing agreement. Involved assessment of the scope and cost of all project activities and regulatory directives.

Impacted Drinking Water and Property Value: Anderson Valley, California - Assisted downgradient property owner in recovering for damages to property from soil and ground water impact due to upgradient leaking UST. Involved file review, meeting with regulatory agency, site inspection, corrective action review, wellhead protection review, and written technical assessment.

Tidal Influence on Free Product and Hydrocarbon Plumes: Napa, California - Evaluated tidal influence on free product occurrence in site wells at a bulk transfer facility adjacent the Napa River. Reviewed site data and recommended alternative remedial approach for the site. Homer, Alaska - Reviewed a hydrogeologic study that evaluated the tidal influence on petroleum hydrocarbon fate and transport beneath the Homer Spill. The ground water flow direction varied 360 degrees, with a preferential flow perpendicular to the closest shoreline.

Property Transaction and Land Development

Experience Overview: During preparation of Phase I and II environmental site assessments (ESA's) for property/business sale or purchase, Mr. Clark-Riddell has provided extensive interaction with client's representatives and others, including attorneys, real estate brokers, lending institutions, tenants, other consultants, and contractors. Mr. Clark-Riddell had worked closely with client to conduct appropriate work scope to achieve client objectives for cost control and liability minimization. He has helped establish baseline conditions, especially important for active service stations with USTs. ESA are typically performed to in compliance with ASTM standards. The ESA's are used to identify potential environmental concerns on the subject property or on adjacent properties. When appropriate, Mr. Clark-Riddell recommends and manages Phase II ESA (subsurface sampling), prepares remediation cost estimates, and oversees Phase III remediation work.

Phase II ESA, Regulatory Interaction, and Liability Assessment for an Industrial Facility in Richmond: For this former industrial facility in Contra Costa County, California, Mr. Clark-Riddell was retained further characterize subsurface chlorinated compounds to help facilitate property sale and liability assumption for residual contamination. The goal of the activity is to further define chlorinated compounds and hopefully demonstrate that detected compounds do not pose a significant risk to human health or the environment. These efforts are designed to quickly outline a plan for monitored natural attenuation, and to minimize the uncertainty pertaining to future compliance costs and potential liability. Pangea was hired through the client's legal counsel to review the new information and estimate lifecycle costs for environmental compliance. Pangea calibrated its cost estimates by contacting key regulatory personnel and discussing site data without site disclosure. Consistent with Pangea's expectations, the regulatory agency indicated that the site would require additional assessment and long-term monitoring at a minimum. Site remediation would only be required if contamination represented a significant threat to human health and/or the environment, to be evaluated by soil gas sampling and a sensitive receptor survey.

Given the project uncertainty, Pangea prepared cost estimates for various assessment and remediation scenarios, and offered a probability analysis of the different scenarios. This approach effectively illustrated the range and likelihood of potential costs. Pangea assisted the client and legal counsel with an evaluation of transaction alternatives for negotiation of final transaction terms with the prospective purchaser. Pangea is currently completing sampling of soil gas, soil and groundwater to assess site conditions, and will update remediation and compliance cost scenarios.

Client quote: "Bob Clark-Riddell went the extra mile for us, and carefully documented possible scenarios and likely costs related to our situation. He also summarized transaction alternatives for managing environmental risk and cost. From a corporate perspective, Mr. Clark-Riddell's reports enabled appropriate action to be discussed at all levels in the organization with no ambiguity. A refreshing approach to a delicate issue."

Remediation for Residential Development and Property Transfer: Mr. Clark-Riddell was the lead manager for remediation and closure of a high-profile former industrial site on approximately 2 acres in Emeryville, CA. The site subsurface was prepared for approximately high-density housing in conjunction with the remediation. Petroleum hydrocarbons impacted the site from two USTs and four ASTs, with free product present. With the escrow deadline approaching, Mr. Clark-Riddell prepared and successfully implemented site remediation to negotiated cleanup standards within nine months. Mr. Clark-Riddell's cost control kept the project on track despite the excavation volume exceeding the prior consultant's estimate by four times. Approximately 17,000 tons of contaminated soil and perched groundwater was removed. Shallow soil gas sampling and risk assessment services helped demonstrate no significant risk to the future site residents. Deed restrictions and vapor barriers were required to facilitate closure. Meetings were held with the RWQCB's risk manager, Alameda County Health Care Services Agency, City of Emeryville, attorneys, developers, property owners, and nearby community members. Resulted in closure without ongoing groundwater monitoring of residual contamination, completed before the final escrow deadline.



Residential Redevelopment using Oakland's Urban Land Redevelopment (ULR) Program: Mr. Clark-Riddell managed site remediation and cleanup level negotiation to facilitate residential redevelopment in Oakland, California. To establish site-specific target levels (SSTs), Mr. Clark-Riddell used the City of Oakland's *Oakland Risk-Based Corrective Action: Technical Background Document* from the ULR Program. Remediation involved soil excavation, and installation of oxygen releasing compound within a 10-ft deep trench to stimulate degradation of residual hydrocarbons. To influence hydrocarbons offsite, hydrogen peroxide was injected in two wells over a six-week period. A sensitive receptor survey identified and safeguarded known receptors.

Liability Assessment and Mitigation: San Francisco, California - Prepared reports estimating potential cost liability associated with known USTs or discovered lead or hydrocarbon impact. Oakland, San Francisco and San Mateo, California - Helped secure "comfort letters" from regulatory agencies on property owner's behalf, which indicate that a third party is responsible for the known contamination. Has assisted with securing indemnification during property transaction process.

Site Assessment and Remediation of Petroleum Hydrocarbons

Soil and Groundwater Assessment and Remediation of Petroleum Hydrocarbons: Lead engineer for scoping site assessment of petroleum hydrocarbons and conducting risk evaluation. In many cases,



assessment activities define the lateral and vertical extent of contamination in a rapid, dynamic manner to control cost and expedite closure. When site cleanup is necessary, Mr. Clark-Riddell evaluates traditional and innovative remedial options and coordinates feasibility and pilot testing. He has designed, permitted and implemented remediation for gasoline service stations for a major oil companies, small oil companies, and independent station owners/dealers. He has coordinated remediation at over 200 service station using dual phase extraction, air sparging, soil vapor extraction, ground water pump and treat, free-product recovery and biosparging. Setup operation and maintenance programs and achieved regulatory case closure.

Free Product Recovery for UST/Hydrant System: Mr. Clark-Riddell was the lead engineer and manager to remediate two-acre vehicle maintenance and fueling facility in San Francisco. Tasks included removal of 4 USTs and 850 linear feet of fiberglass piping from the pressurized hydrant system; installation of a soil and groundwater remediation and treatment system; remediation of stockpiled soil impacted with hydrocarbons and lead to avoid expensive soil disposal as hazardous waste; intensive regulatory negotiations; and ongoing compliance. The insitu remediation system consisted of Soil Vapor Extraction (SVE) and Total Fluid Extraction (TFE) with submersible pneumatic pumps. The TFE system extracted floating hydrocarbons (LNAPL) and groundwater. Aboveground soil bioremediation of 1,000 cubic yards of soil

involved vapor extraction, nutrient addition, and proprietary hydrocarbon degraders. The soil was reused onsite with regulatory approval.

Remediation System Selection and Standardization: Standardized remediation approach and developed equipment for soil vapor extraction and treatment. Compared capabilities, features and cost of blowers, carbon adsorption systems, diffuser stacks, and advanced oxidation equipment such as internal combustion engines and thermal and catalytic oxidizers. Assisted with standardization of remediation work plans and systems for ground water extraction and treatment. Incorporated standardized systems and work plans into remediation projects. Made presentations to major oil companies.

UST Cleanup Fund Assistance: Managed all aspects of UST Cleanup Fund projects, including claim application preparation, pre-approval requests, reimbursement requests. Experience with approximately 25 claimants, projects, including sites in Burlingame, Fremont, Hayward, Milpitas, Mountain View, Oakland, Palo Alto, Sacramento, San Jose, San Francisco, San Mateo, South San Francisco, and Weed. Successful in scoping projects to facilitate full reimbursement from the Fund and to achieve regulatory case closure.



Chlorinated Hydrocarbon Assessment & Remediation

Guaranteed Remediation of PCB and Solvent Plume and Insurance Program: To end the legal stalemate between two manufacturing firms, Mr. Clark-Riddell offered an incentive-based performance guarantee featuring a blend of proven and innovative low-cost remedial solutions combined with sophisticated insurance instruments. The contaminants of concern were PCB and chlorinated solvents (primarily dichlorobenzenes (DCBs) and trichlorobenzenes (TCBs)) in soil and groundwater straddling the property boundary. During negotiations with the RWQCB and the development of site remediation goals, proposed and got approval for, depth-specific cleanup levels to control cost. Approximately 1,200 tons of contaminated soil was removed from the site and VOC concentrations in groundwater have decreased by two orders of magnitude.

PCE and Stoddard Solvent at Former Dry Cleaners: Emeryville, California - Performed lateral and vertical assessment of PCE and Stoddard solvent in multiple shallow water bearing zones. Installed wells in different depths. Effort related to property transaction and litigation. Used dynamic techniques to adequately assess contamination quickly and cost effectively.

Dry Cleaner Sites: Berkeley, California - Performed extensive site assessment, indoor air testing, and mitigation testing in a fast and dynamic manner to evaluate conditions and respond to discovered subsurface PCE and related degradation compounds at an operating dry cleaning facility. Helped determine PCE extent in soil gas, soil and groundwater. Used membrane interface probe equipment to provide real-time data on contaminant concentrations and soil conductivity to better assess conditions and select confirmation soil and groundwater sampling locations. Conducted indoor air sampling within operating cleaner and adjacent buildings to assess potential impact to indoor air. Completed testing of subslab vapor extraction for site interim remediation and vapor collection. Worked with client and legal counsel. Oakland, California - Helped design and implement a remedial approach for a former dry cleaner site, which resulted in case closure from the Water Board. Abandoned facility had been idle for over six years and under litigation. Emeryville, California - Performed lateral and vertical assessment of PCE and Stoddard solvent in multiple shallow water bearing zones. Installed wells in different depths. Effort related to property transaction and litigation. Used dynamic techniques to adequately assess contamination quickly and cost effectively.

Soil Vapor Extraction of TCE: Mountain View, California - After evaluating different remedial alternatives and feasibility testing, designed and installed vapor extraction system to remove TCE and other chlorinated compounds from soil and ground water.

TCE and PCE Remediation: Palo Alto, California - Represented property owner's interest in evaluating and improving remediation efforts using dual-phase extraction and ground water extraction at a former plating facility.

TCE and Vinyl Chloride Remediation: Livermore, California - Negotiated for shutdown of pump and treat system after achieving asymptotic removal rates. Used field testing to demonstrate other remedial technologies were not cost effective or applicable.

Feasibility Studies: Prepared remedial feasibility studies for several sites in the San Francisco Bay Area with either hydrocarbons or halogenated volatile organic compounds. Evaluated numerous equipment suppliers and system effectiveness of remedial technologies, including ultraviolet/hydrogen peroxide treatment of ground water for halogenated and non-halogenated compounds.

Remediation Engineering for DOE: U.S. EPA Superfund Sites, Livermore, California - Prepared economic and performance evaluation of in-situ air sparging compared to conventional vapor and ground water extraction for remediation of TCE based on field tests at DOE in Savannah River. Prepared cost estimates for remediation alternatives. Evaluated soil vapor treatment system included automated carbon adsorption and thermal oxidation with vapor phase scrubbing for sites in the Mocha and Spring Subbasins and the Altamont Hills.

Metals Containment & Remediation

Lead Containment: Oakland, California - Evaluated remedial strategies for lead-bearing soil at a former scrap yard. Researched naturally-occurring lead concentrations in Oakland. Selected remedial strategy consisting of lime treatment of shallow soil and capping to control pH in site soil for preventing lead mobilization.

Arsenic and Hydrocarbon Remediation: Hayward, California - Designed a ground water extraction and treatment system to remediate gasoline-range hydrocarbons and arsenic. Activated alumina cartridges were used to treat the arsenic, which apparently originated from pesticide use in old orchards. Complex interbedded clay and sandy units complicated the remedial efforts.

Zinc in Soil and Groundwater: Oakland, California - For this property transaction at an industrial facility, Bob Clark-Riddell interfaced with the California EPA (DTSC), the Regional Water Quality Control Board, seller and their legal counsel to assess and remediate metals (zinc and other compounds) and low pH at the site.

Barium Excavation During UST Removal: Berkeley, California - Coordinated removal of a 1,000-gallon waste oil tank and 250 cubic yards of Class I hazardous soil due to elevated barium concentrations. Used mobile laboratory to expedite project and control costs. Excavated to fullest extent practical without undermining a street and building. Received regulatory closure.

Regulatory Compliance/Hazardous Materials



Regulatory Compliance for Large Private Firm: San Francisco, California - For this large client Mr. Clark-Riddell has been providing regulatory compliance services for up to 10 years, assisting with a wide range of compliance needs at their many facilities. Services have HMBPs, SPCCs & compliance audits, air permit updates, waste discharge sampling and reporting, DTSC Voluntary Cleanup Agreement, and site remediation and monitoring.

Stormwater: Northern California - For several school districts and industrial/commercial facilities Mr. Clark-Riddell has been managing preparation of stormwater pollution prevention plans (SWPPPs) and annual stormwater monitoring.

Bob Clark-Riddell, P.E.

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Waste Disposal: For the City of Oakland Mr. Clark-Riddell has coordinated disposal of hazardous materials. Includes profiling assistance and working with disposal contractors and disposal facilities. Provided waste disposal services for numerous assessment and remediation projects.

Land Development Feasibility Studies under NEPA: Arlington, Virginia - Managed a feasibility study and site design guidelines study per NEPA requirements for a development of 4.4 millions square feet of occupiable office space in a congested urban setting. Involved site review and geotechnical and subsurface investigations which indicated the presence of freon, PCBs, and petroleum hydrocarbons. Also involved assessing the impact to waterfowl and other wildlife habitats, water quality, wetlands, and the transportation and other socioeconomic infrastructure. Managed a second study to develop a six-story 1.6 million square feet building in a wooded suburban setting along a creek, requiring habitat delineation, urban planning and community relations.

Wetlands Delineation and Restoration

Wetlands Delineation and Restoration: San Mateo, California - Under oversight by the U.S. Army Corps of Engineers, Mr. Clark-Riddell coordinated a wetlands delineation study and subsequent restoration for this small airport parcel. Mr. Clark-Riddell worked closely with a Certified Wetlands Scientist to survey the parcel and implement restoration.

Construction Management

Office Building Construction: Silver Spring, Maryland - Was onsite engineer responsible for inspecting electrical and mechanical construction with respect to construction drawings for a 12-story office building for the U.S. General Services Agency.

USPS Facility Upgrade: San Francisco, California - Project manager for oversight of \$5 million upgrade of main mail processing facility for U.S. Postal Service.

Remediation System Installation: Oversight of remediation systems throughout California, including inspection of civil, mechanical, and electrical disciplines.

Technical Proposal Services

Proposal Preparation Services: Los Angeles, California - Hired as technical writer for preparation of large government proposals including Emergency Response Services for EPA Region 4 of the Southeastern U.S., and assessment and remediation services for the TERC for the Army Corps of Engineers. Invaluable experience with large teams of technical staff/writers, graphic illustrators, and senior management under tight time frames and high stakes.

Andy's BP Inc v. Amir Shirazi et al
1590 and 1604 McKee Road, San Jose, CA

Opinion #1: Gasoline-related contamination from 1604 McKee (1) has likely impacted 1590 McKee property in the past and may still currently impact 1590 McKee, and (2) has likely impacted property nearby 1590 McKee where the regulatory agencies have required additional contamination delineation by the 1590 McKee responsible party.

This opinion is based on the following information:

1. A significant release of gasoline-related compounds occurred at 1604 McKee (Moe's Arco), as evidenced by soil and groundwater contamination at the site [Groundwater Investigation Report by WellTest, September 25, 2009].
2. "The stability of the dissolved-phase groundwater plume has not been determined" for the 1604 McKee release [Groundwater Investigation Report by WellTest, September 25, 2009]. Additional evaluation of plume stability is required [Well Installation Report by WellTest, January 7, 2010]
3. The groundwater direction from 1604 McKee is partially toward 1590 McKee, with 1590 McKee in the cross/downgradient direction from 1604 McKee [Figure 1]. Dissolved contamination tends to move in a downgradient direction, and to diffuse laterally (including crossgradient) due to the contaminant concentration gradient.
4. MTBE is highly soluble in water and tends to migrate in groundwater significantly faster than other gasoline-related compounds due to its high solubility and low rates of adsorption to soil.
5. Subsurface utility conduits are present under McKee Road and slope downward past 1604 McKee toward 1590 McKee. The invert (flow line) of the storm drain sewer is approximately 6 ft deep, with the storm drain backfill material extending to approximately 7 ft deep. The water depth in Arco well MW-2 has ranged from approximately 5 to 8 ft depth. Therefore, when the groundwater is shallower than the storm drain trench bottom the storm drain is a potential conduit for contaminant migration toward the 1590 McKee site. Sanitary sewers also run past both sites on both sides of McKee Road, but the depth is not shown on the reviewed maps. These sanitary sewers may also be conduits for contaminant migration from 1604 McKee toward 1590 McKee. [Storm drain and sanitary sewer maps].
6. MTBE detected in Arco well MW-5 located downgradient of 1604 McKee on the Anne Darling School property suggests that MTBE has migrated at least 150 ft from the 1604 McKee site (and that MTBE is present across McKee Road from the 1590 McKee site) [Well Installation Report by WellTest, January 7, 2010]. For comparison, contamination from nearby former Chevron site apparently migrated approximately 250 ft downgradient according to well locations [Figure 1], while contamination from a petroleum hydrocarbon release at 1590 McKee (Gas & Shop)(first discovered during a 1988 fuel piping repair) apparently migrated approximately 220 ft downgradient assuming MTBE detected in offsite Gas & Shop well MW-12 is not from another source such as 1604 McKee [Gas & Shop Monitoring Reports].

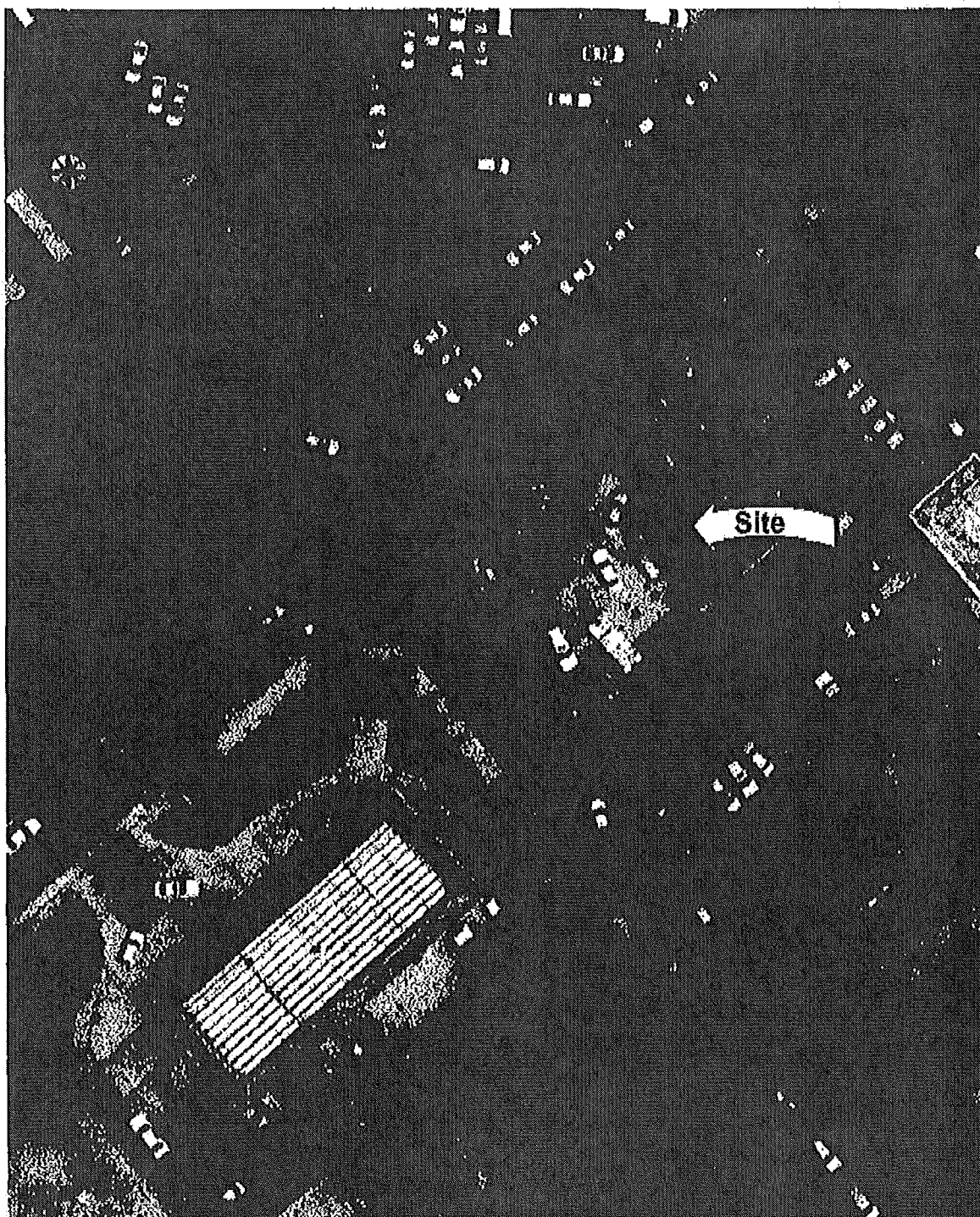
7. **The highest MTBE concentrations in groundwater have been observed at 1604 McKee; 4,900 ug/L in well MW-2 on 10/21/01 versus 4,040 ug/L at 1590 McKee in MW-9 on 9/24/04 [Groundwater Monitoring Reports]**
8. **MTBE concentrations in groundwater could be higher than observed because the well screen (13'-18' depth) for Arco well MW-2 has been consistently submerged [Well Installation Report by WellTest, January 7, 2010], and shallower gasoline-related contamination was detected shallower (10' depth) in site soil 1604 McKee, including the only MTBE detected in soil. [Table 2, Groundwater Investigation Report by WellTest, September 25, 2009]. Similarly, the well screen for MW-5 is also submerged so dissolved constituent concentrations may not be representative and could be higher than reported [Well Installation Report by WellTest, January 7, 2010].**
9. **When MTBE was first discovered in Arco well MW-2, the closest well at the 1590 McKee site was Gas & Shop well MW-2 [Figure 1]. MTBE concentrations in Gas & Shop well MW-2 are significantly lower than in upgradient Arco well MW-2 and exhibit a similar concentration trend [Figure 2]. During the first monitoring of Arco well MW-2 on January 13, 2000, an elevated MTBE concentration of 3,000 ug/L was detected. Approximately nine months later the MTBE concentration in Gas & Shop well MW-2 increased from 13 ug/L to 320 ug/L [Monitoring Reports].**

Opinion #2: Contamination emanating from 1604 McKee has caused the 1590 McKee owner/responsible party (RP) to incur estimated damages ranging from \$8,600 to \$43,000.

This opinion is based on the following information:

1. **1590 McKee owner/RP was required to install and monitor well MW-8 in 33rd Street between 1590 and 1604 McKee sites.**
2. **1590 McKee owner/RP was required to install and monitor wells MW-10 and MW-11 in McKee Road, which are located in the cross/downgradient direction from both 1590 and 1604 McKee sites.**
3. **Wells MW-10 and MW-11 are located nearby underground storm drain and sanitary sewer utilities that could have acted as preferential pathways for contaminant migration from the 1604 McKee site to the McKee Road impact monitored by these wells.**
4. **Well installation costs include workplan preparation, interaction with agency oversight staff, permitting, other pre-field planning activities, drilling by a licensed contractor, soil sampling, well materials, well development, laboratory analyses, soil and water disposal, traffic control, wellhead surveying, and reporting. These well installation and related costs are estimated to cost approximately \$15,000.**

5. **Twenty eight monitoring events have been performed on well MW-8, MW-10 and MW-11, for a total of 84 well monitoring/samplings over an eight year period (2003 to 2011). Each monitoring event includes cost for well gauging, well sampling, laboratory analyses, field supplies, permitting, traffic control (including hiring of off-duty San Jose Police officers), water disposal, and reporting. Assuming a cost of approximately \$800/well for monitoring, the monitoring costs for the 84 well monitoring episodes is approximately \$67,000.**
6. Project management costs for well installation and monitoring of these wells are estimated to be approximately \$4,000, assuming approximately \$500/year for eight years.
7. **Combining the above 'corrective action' costs yields a total cost of approximately \$86,000 incurred by 1590 McKee RP.**
8. Parties with commingled contaminant plumes often apportion cost responsibility to each contributor based on the estimated relative contaminant contribution from each hydrocarbon release. For cost estimation purposes, I estimate that the **contribution from 1604 McKee release to the area near and downgradient of the 1590 McKee site (between MW-8 and MW-11) could range from 10% to 50%. Correspondingly, the corrective action costs or damages incurred by 1590 McKee RP range from \$8,600 to \$43,000.**
9. This cost range does not include costs incurred for the following offsite assessment performed nearby 1590 McKee in locations where contamination could have migrated from 1604 McKee: soil and groundwater investigation within McKee Road in 2005 (Borings HP-1 through HP-8); offsite well installation in 2006 (MW-12, MW-13 and MW-14); monitoring of offsite wells MW-12, MW-13 and MW-14; and groundwater investigation in 2010 (Borings HP-11 through HP-17).



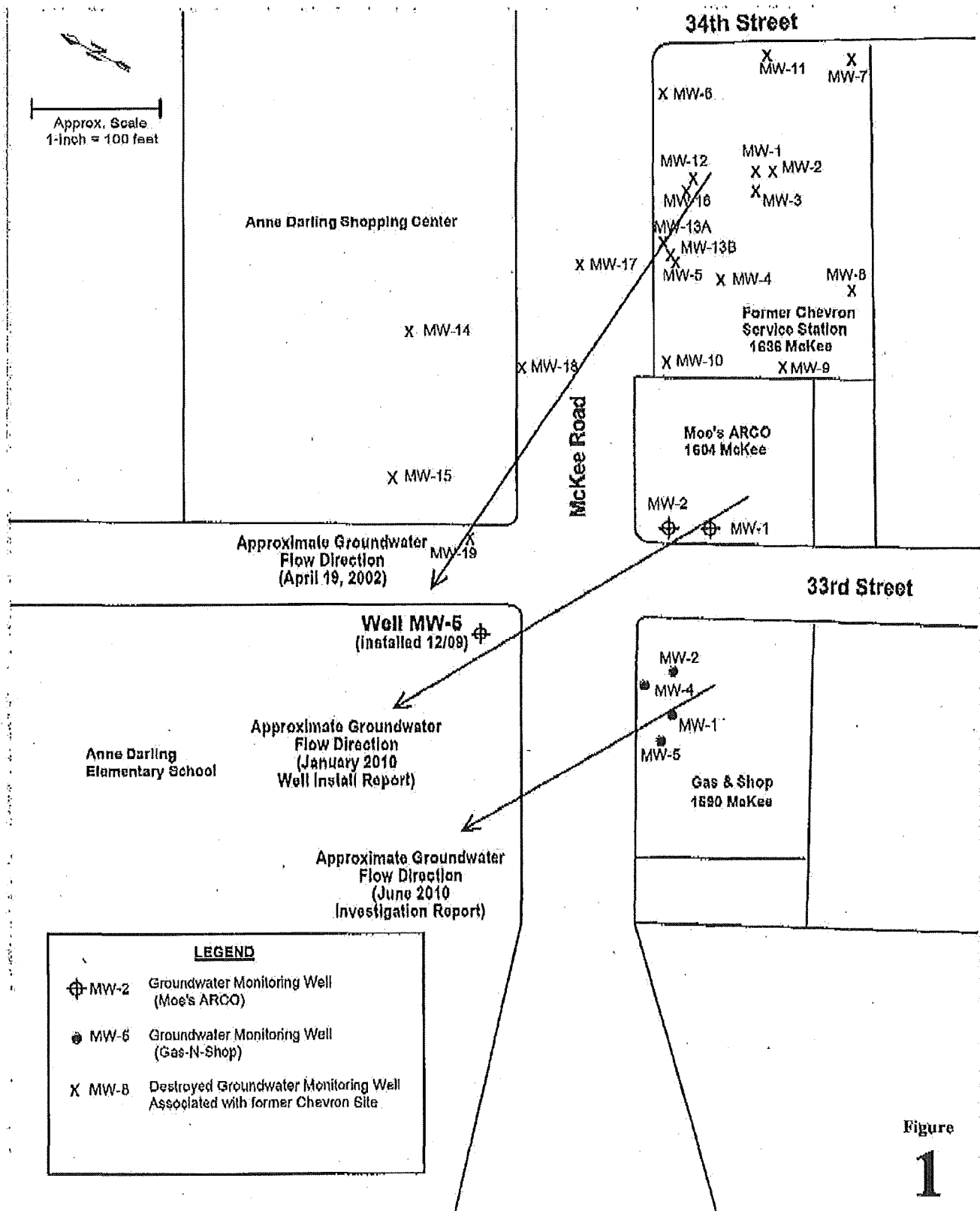
Aerial Photograph Source: Google Earth 2008

WellTest, Inc.
P.O. Box 8548
San Jose, CA 95155

Aerial Photograph of Site Area
Roy's Mobil
197 East Jackson Street
San Jose, CA

FIGURE
2

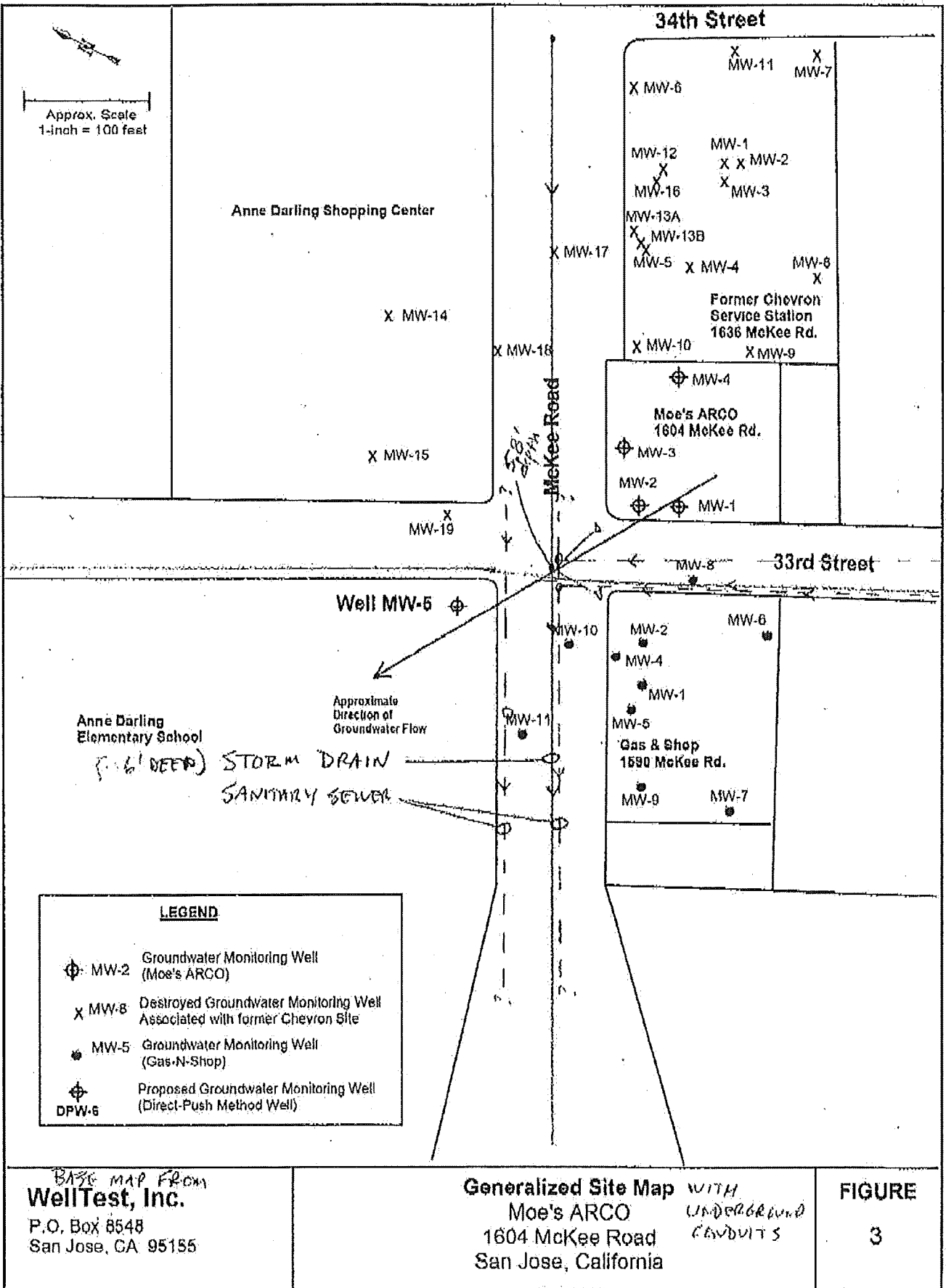
JOB NO. 2072



Gas & Shop and Moe's ARCO
1590 & 1604 McKee Road
San Jose, California



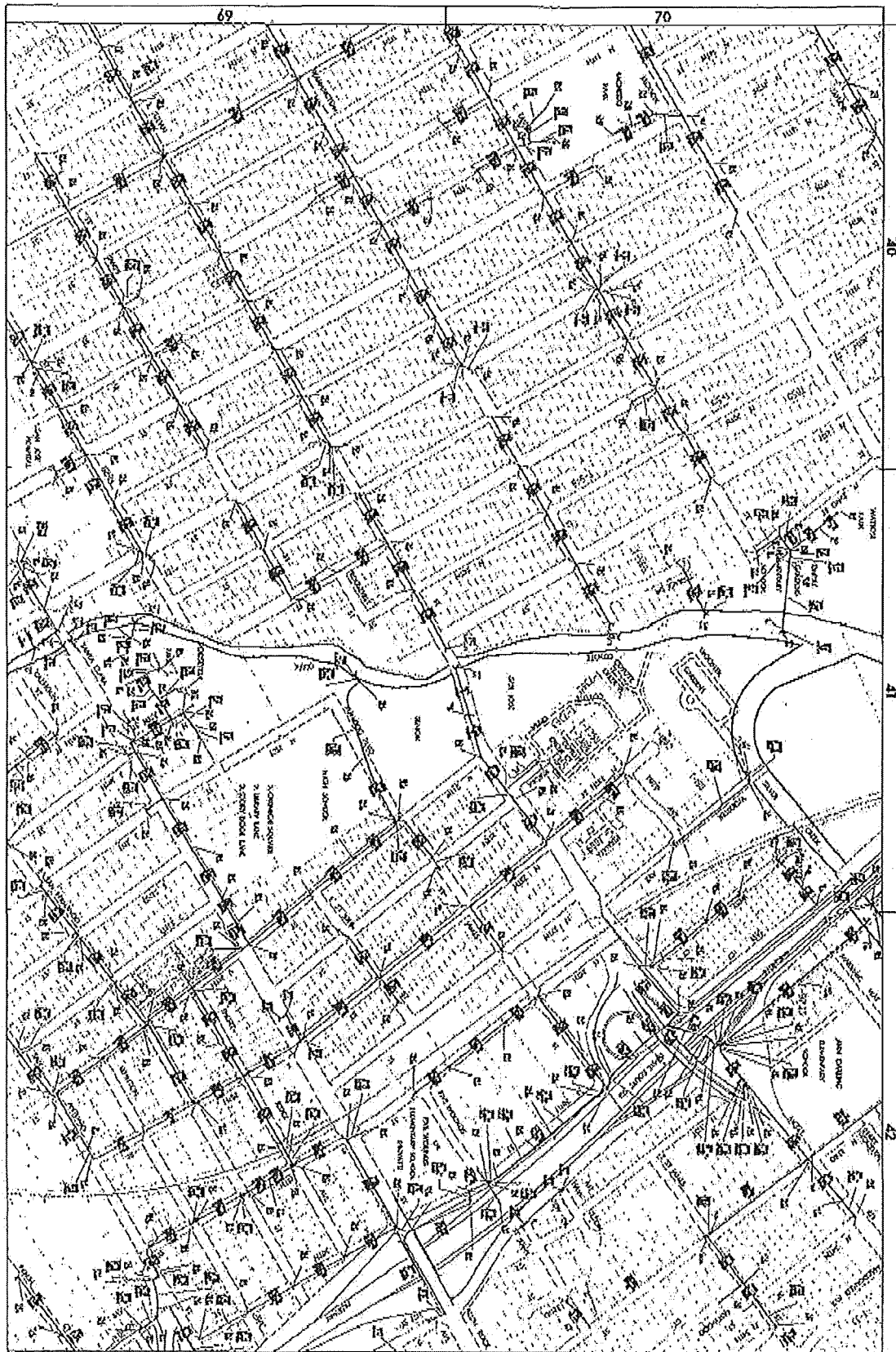
Historic Well Locations (2002)
and Groundwater Flow Direction



BASE MAP FROM
WellTest, Inc.
P.O. Box 8548
San Jose, CA 95155

Generalized Site Map WITH
UNDERGROUND
CAVITIES
Moe's ARCO
1604 McKee Road
San Jose, California

FIGURE
3



<p>67D</p>	<p>DATE 6/1/80</p>	<p>2</p>	<p>SCALE: 1"=500' NORTH: EXT. 06/1/80 CITY OF SAN JOSE, CALIF.</p>	<p>CITY OF SAN JOSE DEPARTMENT OF PUBLIC WORKS PAUL ADAMS, DIRECTOR PROJECT: STORM DRAIN SYSTEM</p>	<p>CITY OF SAN JOSE DEPARTMENT OF PUBLIC WORKS PAUL ADAMS, DIRECTOR PROJECT: STORM DRAIN SYSTEM</p>	<p>STORM DRAIN SYSTEM</p> <p>THIS MAP IS FOR INFORMATION ONLY AND DOES NOT CONSTITUTE A CONTRACT. THE CITY OF SAN JOSE IS NOT RESPONSIBLE FOR ANY DAMAGE OR LOSS OF PROPERTY RESULTING FROM THE USE OF THIS MAP. THE CITY OF SAN JOSE IS NOT RESPONSIBLE FOR ANY DAMAGE OR LOSS OF PROPERTY RESULTING FROM THE USE OF THIS MAP.</p>
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TABLE 1
Well Construction Details
Moe's ARCO
1604 McKee Road
San Jose, CA

Well I.D.	Well Type	SCVWD Permit #	DWR #	Installation Date	Casing Diameter (Inches)	Borehole Depth (ft bgs)	Screened Interval (ft bgs)	TOC Elevation (ft. MSL)	DTW (btoc) (03/10 /10)	Well Screen Flooded?
MW-1	Monitoring	99W00787	714577	12/22/99	2	18	13 to 18	84.76	5.10	Yes
MW-2	Monitoring	99W00788	714578	12/22/99	2	20	13 to 20	84.64	5.63	Yes
MW-3	Monitoring	09W00320	e0091120	07/15/09	¾	18	13 to 18	Not Surveyed	5.44	Yes
MW-4	Monitoring	09W00319	e0091119	07/15/09	¾	18	13 to 18	Not Surveyed	5.97	Yes
MW-5	Monitoring	09W00760	e0099572	12/21/09	¾	20	15 to 20	Not Surveyed	7.23	Yes

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Well Number	Date	TPH _g	B	T	E	X	MTBE	MTBE*	DPE	ETBE	TAME	TBA	EDB	1,2-DCA	Meth.	Eth.	Depth	TOC	GW	Screen
		µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	to GW	Elev.	Elev.	Submerged?
MW-1 (Screened 13'-18')	01/13/00	100	1	<0.5	2.1	2.9	580	640	<25	<25	<25	170	<0.5	<0.5	na	na	7.11	84.76	77.65	Yes
	04/20/00	<50	<0.5	<0.5	<0.5	<0.5	610	na	na	na	na	na	na	na	na	na	4.71	84.76	80.95	Yes
	07/26/00	<50	<0.5	<0.5	<0.5	<0.5	590	na	na	na	na	na	na	na	na	na	6.63	84.76	78.13	Yes
	01/12/01	120	4.6	0.51	<0.5	0.62	1,000	na	na	na	na	na	na	na	na	na	6.19	84.76	78.57	Yes
	07/13/01	<50	<0.5	<0.5	<0.5	0.87	320	220	<5.0	<5.0	<5.0	<24	na	na	na	na	6.48	84.76	78.28	Yes
	10/12/01	<50	<0.5	<0.5	<0.5	<0.5	280	250	<5.0	<5.0	<5.0	<25	na	na	na	na	6.81	84.76	77.95	Yes
	01/11/02	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	5.79	84.76	78.97	Yes
	02/25/02	<50	<0.5	<0.5	<0.5	<0.5	<5.0	5	<5.0	<5.0	<5.0	<25	na	na	na	na	5.82	84.76	78.94	Yes
	04/19/02	<50	<0.5	<0.5	<0.5	<0.5	<5	1.0	<5.0	<0.5	<0.5	<5	na	na	na	na	5.91	84.76	78.85	Yes
	09/30/02	<50	<0.5	2.0	<0.5	9.3	78	98	<2.5	<2.5	<2.5	<2.5	na	na	<2,500	<250	6.13	84.76	78.63	Yes
	12/26/02	<50	<0.5	<0.5	<0.5	<0.5	<5.0	1.0	<0.5	<0.5	<0.5	<5.0	na	na	na	na	4.95	84.76	79.78	Yes
	02/03/03	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.39	84.76	79.37	Yes
	04/23/03	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.91	84.76	78.85	Yes
	07/07/03	<50	<0.5	<0.5	<0.5	<0.5	170	na	na	na	na	na	na	na	na	na	6.01	84.76	78.75	Yes
	10/09/03	<50	<0.5	<0.5	<0.5	<0.5	7.9	na	na	na	na	na	na	na	na	na	6.45	84.76	78.31	Yes
	02/06/04	76	<0.5	<0.5	<0.5	2.6	110	na	na	na	na	na	na	na	na	na	5.49	84.76	79.27	Yes
	06/22/04	<50	<0.5	<0.5	<0.5	<0.5	25	na	na	na	na	na	na	na	na	na	6.24	84.76	78.52	Yes
	09/20/04	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	6.72	84.76	78.04	Yes
	12/29/04	<50	<0.5	<0.5	<0.5	<0.5	110	na	na	na	na	na	na	na	na	na	5.90	84.76	78.86	Yes
	03/18/05	<50	<0.5	<0.5	<0.5	<0.5	100	na	na	na	na	na	na	na	na	na	4.68	84.76	80.08	Yes
	06/15/05	<50	<0.5	<0.5	<0.5	<0.5	72	na	na	na	na	na	na	na	na	na	5.60	84.76	79.16	Yes
	09/29/05	<50	<0.5	<0.5	<0.5	<0.5	78	na	na	na	na	na	na	na	na	na	6.80	84.76	77.96	Yes
	03/30/06	<50	<0.5	<0.5	<0.5	<0.5	32	30	<0.5	<0.5	<0.5	<5.0	na	<0.5	<500	<50	4.55	84.76	80.21	Yes
	06/27/06	<50	<0.5	<0.5	<0.5	<0.5	33	32	<0.5	<0.5	<0.5	<5.0	<0.5	<0.5	na	na	6.03	84.76	78.73	Yes
	09/26/06	82	3.9	3.8	1.6	11	41	59	<1.2	<1.2	<1.2	<12	<1.2	<1.2	na	na	7.32	84.76	77.44	Yes
	12/06/06	150	2.8	1.2	5.3	12	25	21	<0.5	<0.5	<0.5	<5.0	<0.5	<0.5	na	na	7.13	84.76	77.63	Yes
	02/20/07	140	9.7	15	4.0	26	23	22	<0.5	<0.5	<0.5	<5.0	<0.5	<0.5	na	na	6.26	84.76	78.50	Yes
	05/25/07	<50	<0.5	<0.5	<0.5	<0.5	32	28	<0.5	<0.5	<0.5	<5.0	<0.5	<0.5	na	na	6.58	84.76	78.20	Yes
	09/24/07	<50	<0.5	<0.5	<0.5	0.40	27	35	<0.5	<0.5	<0.5	<5.0	<0.5	<0.5	<500	<50	7.52	84.76	77.24	Yes
	12/06/07	<50	<0.5	0.82	0.55	2.5	22	na	na	na	na	na	na	na	na	na	7.19	84.76	77.57	Yes
	03/26/08	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.72	84.76	79.04	Yes
	06/05/08	<50	<0.5	<0.5	<0.5	<0.5	7	na	na	na	na	na	na	na	na	na	6.74	84.76	78.02	Yes
	08/01/08	<50	<0.5	<0.5	<0.5	<0.5	16	na	na	na	na	na	na	na	na	na	7.55	84.76	77.21	Yes
	10/31/08	<50	<0.5	<0.5	<0.5	<0.5	21	na	na	na	na	na	na	na	na	na	8.09	84.76	76.67	Yes
	03/28/09	<50	<0.5	<0.5	<0.5	<0.5	11	na	na	na	na	na	na	na	na	na	5.71	84.76	79.05	Yes
	07/20/09	<50	<0.5	<0.5	<0.5	<0.5	15	na	na	na	na	na	na	na	na	na	7.26	84.76	77.50	Yes
	03/03/09	<50	<0.5	<0.5	<0.5	<0.5	na	7.2	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.10	84.76	79.66	Yes

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1694 McKee Road
San Jose, CA

Well Number	Date	TPH _g	B	T	E	X	MTBE	MTBE*	DIPE	ETBE	TAME	TBA	EDB	1,2-DCA	Meth.	Eth.	Depth	TOC	GW	Screen
		µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	to GW	Elev.	Elev.	Submerged?
MW-2 (Screened 13-20')	01/13/00	2,000	53	4.1	34	11	2,400	3,000	<50	<50	<50	<50	<250	<0.5	<0.5	<0.5	7.41	84.64	77.23	Yes
	04/20/00	440	8.1	<0.5	1.9	0.98	3,100	na	na	na	na	na	na	na	na	na	5.33	84.64	79.31	Yes
	07/26/00	770	29	2.3	7.0	3.1	4,100	na	na	na	na	na	na	na	na	na	6.77	84.64	77.87	Yes
	01/12/01	320	30	2.0	0.86	3.4	3,900	na	na	na	na	na	na	na	na	na	6.41	84.64	78.23	Yes
	07/13/01	590	22	<1.0	<1.0	0.93	4,700	4,500	<50	<50	<50	1400	na	na	na	na	6.71	84.64	77.93	Yes
	10/12/01	290	20	<0.5	<0.5	<0.5	4,900	4,500	<100	<100	<100	<500	na	na	na	na	7.55	84.64	77.09	Yes
	01/11/02	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	6.19	84.64	78.45	Yes
	02/25/02	<250	0.5	<0.5	<0.5	<0.5	3,400	3,600	<100	<100	<100	<500	na	na	na	na	7.55	84.64	77.09	Yes
	04/19/02	130	<1	<1	<1	<1	2,900	3,500	<50	<50	<50	570	na	na	na	na	8.12	84.64	78.52	Yes
	09/30/02	130	1.2	0.83	<0.5	3.2	1,600	2,200	<50	<50	<50	<500	na	na	<50,000	<5,000	8.14	84.64	78.50	Yes
	12/26/02	<100	<1	<1	<1	<1	2,200	2,200	<50	<50	<50	<500	na	na	na	na	5.55	84.64	79.09	Yes
	02/03/03	<150	<1.5	<1.5	<1.5	<1.5	2,300	na	na	na	na	na	na	na	na	na	5.82	84.64	78.82	Yes
	04/23/03	<150	<1.5	<1.5	<1.5	<1.5	2,500	na	na	na	na	na	na	na	na	na	5.41	84.64	79.23	Yes
	07/07/03	120	<0.5	<0.5	<0.5	<0.5	1,800	na	na	na	na	na	na	na	na	na	6.33	84.64	78.31	Yes
	10/09/03	190	0.78	<0.5	<0.5	<0.5	1,900	na	na	na	na	na	na	na	na	na	6.76	84.64	77.88	Yes
	02/06/04	170	<0.5	<0.5	<0.5	2.0	1,600	na	na	na	na	na	na	na	na	na	6.02	84.64	78.62	Yes
	06/22/04	160	0.72	<0.5	<0.5	<0.5	1,300	na	na	na	na	na	na	na	na	na	6.60	84.64	78.04	Yes
	09/20/04	410	25	1.7	4.0	2.0	810	na	na	na	na	na	na	na	na	na	7.06	84.64	77.58	Yes
	12/29/04	170	2.3	<0.5	0.52	1.8	930	na	na	na	na	na	na	na	na	na	6.30	84.64	78.34	Yes
	03/18/05	220	2.4	<0.5	<0.5	0.76	850	na	na	na	na	na	na	na	na	na	5.25	84.64	79.39	Yes
	06/15/05	220	5.3	<0.5	1.7	0.64	750	na	na	na	na	na	na	na	na	na	6.05	84.64	78.59	Yes
	09/29/05	110	3.3	<0.5	1.1	1.1	710	na	na	na	na	na	na	na	na	na	7.15	84.64	77.49	Yes
	03/30/06	150	2.5	<0.5	0.67	0.9	430	340	<5.0	<5.0	<5.0	100	na	na	<5,000	<500	5.22	84.64	79.42	Yes
	06/27/06	280	3.3	1.2	1.3	2.2	410	410	<10	<10	<10	130	<10	na	na	na	6.53	84.64	78.11	Yes
	08/26/06	120	1.0	0.72	0.53	2.6	470	550	<17	<17	<17	<170	<17	na	na	na	7.56	84.64	77.06	Yes
	12/08/06	180	0.87	<0.5	<0.5	1.1	280	280	<10	<10	<10	<100	<10	<10	na	na	7.42	84.64	77.22	Yes
	02/20/07	160	1.90	0.67	0.52	1.9	280	260	<5.0	<5.0	<5.0	<50	<5.0	<5.0	na	na	6.70	84.64	77.94	Yes
	05/25/07	90	1.30	<0.5	<0.5	<5.0	250	280	<5.0	<5.0	<5.0	<50	<5.0	<5.0	na	na	5.87	84.64	77.77	Yes
	09/24/07	280	3.0	0.29	0.30	0.76	120	170	<5.0	<5.0	<5.0	180	<5.0	<5.0	<5,000	<500	7.65	84.64	76.99	Yes
	12/06/07	190	0.68	<0.5	<0.5	<0.5	84	na	na	na	na	na	na	na	na	na	7.52	84.64	77.12	Yes
	03/26/08	230	1.8	<0.5	0.78	2.6	<100	na	na	na	na	na	na	na	na	na	6.10	84.64	78.54	Yes
	06/05/08	220	0.81	<0.5	<0.5	<0.5	59	na	na	na	na	na	na	na	na	na	7.02	84.64	77.62	Yes
	08/01/08	170	2.1	<0.5	<0.5	<0.5	48	na	na	na	na	na	na	na	na	na	7.68	84.64	76.96	Yes
	10/31/08	150	1.4	<0.5	<0.5	<0.5	32	na	na	na	na	na	na	na	na	na	8.15	84.64	76.49	Yes
	03/29/09	91	<0.5	<0.5	<0.5	<0.5	32	na	na	na	na	na	na	na	na	na	6.08	84.64	78.56	Yes
	07/20/09	87	<0.5	<0.5	<0.5	<0.5	53	na	na	na	na	na	na	na	na	na	7.43	84.64	77.21	Yes
	03/09/09	100	<1.0	<1.0	<1.0	<1.0	na	43	<1.0	<1.0	<1.0	120	<1.0	<1.0	na	na	5.63	84.64	79.01	Yes

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Well Number	Date	TPHg	B	T	E	X	MTBE	MTBE*	DPE	ETBE	TAME	TBA	EDS	1,2-DCA	Meth.	Esth.	Depth	TOC	GW	Screen
		pg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	µg/L	to GW	Elev.	Elev.	Submerged?
MW-3 (Screened 13 - 18')	07/20/09	75	<0.5	1.8	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	7.41	NS	NC	Yes
	03/09/10	<50	<0.5	<0.5	<0.5	<0.5	na	<0.5	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.44	NS	NC	Yes
MW-4 (Screened 13 - 18')	07/20/09	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	12.60	NS	NC	Yes
	03/10/10	<50	<0.5	<0.5	<0.5	<0.5	na	<0.5	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.97	NS	NC	Yes
MW-5 (Screened 15 - 20')	01/05/10	<50	<0.5	<0.5	<0.5	1.9	na	1.4	na	na	na	na	na	na	na	na	9.40	NS	NC	Yes
	03/10/10	<50	<0.5	<0.5	<0.5	<0.5	na	1.4	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	7.23	NS	NC	Yes
DP-1	10/05/09	<50	<0.5	<0.5	<0.5	1.9	na	1.4	na	na	na	na	na	na	na	na	9.40	NS	NC	Yes

TABLE 3
Soil Sampling Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Boring Name	Sample ID	Sample Depth (ft bgs)	Date	TPHg mg/Kg	B mg/Kg	T mg/Kg	E mg/Kg	X mg/Kg	MTBE mg/Kg
MW-1	S-MW1-5	5	12/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	S-MW1-10	10	12/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	0.23
	S-MW1-15	15	12/22/99	39	0.014	0.019	0.097	0.19	<0.05
MW-2	S-MW2-5	5	12/22/99	1.2	0.015	0.008	<0.005	0.016	<0.05
	S-MW2-10	10	12/22/99	140	314	0.33	5.8	0.31	<0.5
	S-MW2-15	15	12/22/99	930	4.3	1.0	5.7	1.9	<2
MW-3	MW-3d5.0	5	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-3d10.0	10	07/15/09	1.3	<0.005	0.012	<0.005	<0.005	<0.05
	MW-3d15.0	15	07/15/09	7.5	<0.005	0.16	0.015	<0.005	<0.05
MW-4	MW-4d5.0	5	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-4d10.0	10	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-4d15.0	15	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
None	S-P1-3	3	01/22/99	<1.0	<0.005	0.012	<0.005	0.032	<0.05
None	S-P2-3	3	01/22/99	<1.0	<0.005	0.007	<0.005	0.019	<0.05
None	S-P3-3.5	3.5	01/22/99	<1.0	<0.005	0.010	<0.005	0.025	<0.05
None	S-P4-3.5	3.5	01/22/99	2.0	<0.005	0.058	<0.005	0.19	<0.05
None	S-PLA-2.5	2.5	01/22/99	<1.0	0.005	0.007	0.022	0.015	<0.05
None	S-P1-3	3	01/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05

Notes:

TPHg = total petroleum hydrocarbons as gasoline

B = benzene

T = toluene

MTBE = Methyl tert-Butyl Ether

Parts per million = ppm = mg/Kg

NA = not analyzed

nm = not measured

E = Ethylbenzene

X = Total Xylenes

* = Data unavailable

Samples LF-1, LF-2, and LF-3 collected by Levine-Fricke

Samples WT-1, WT-2, WT-3, and WT-4 collected by WellTest, Inc.

See Attachment F for a map showing the locations of the 01/22/99 soil samples

WellTest, Inc. (Project #2187)

Moe's ARCO

1604 McKee Road, San Jose, California

Log of Well MW-5

Sheet 1 of 1

Date(s) Drilled	December 21, 2009	Logged By	Bill Dugan, PG	Checked By	Bill Dugan, PG
Drilling Method	Direct-Push	Drill Bit Size/Type	2.125" ESP Probe Rod with 2.375" Expendable Steel Tip	Total Depth of Borehole	20 feet bgs
Drill Rig Type	GeoProbe 540-UD	Drilling Contractor	WellTest, Inc. (C57-B43074)	Approximate Surface Elevation	75 feet MSL
Groundwater Level and Date Measured	9.4 feet measured on 01/05/10	Sampling Method(s)	4' ESP Geo MC Sample Tube with PVC Liner	Hammer Date	G42
Borehole Backfill	Well Completion	Well elevation not surveyed			

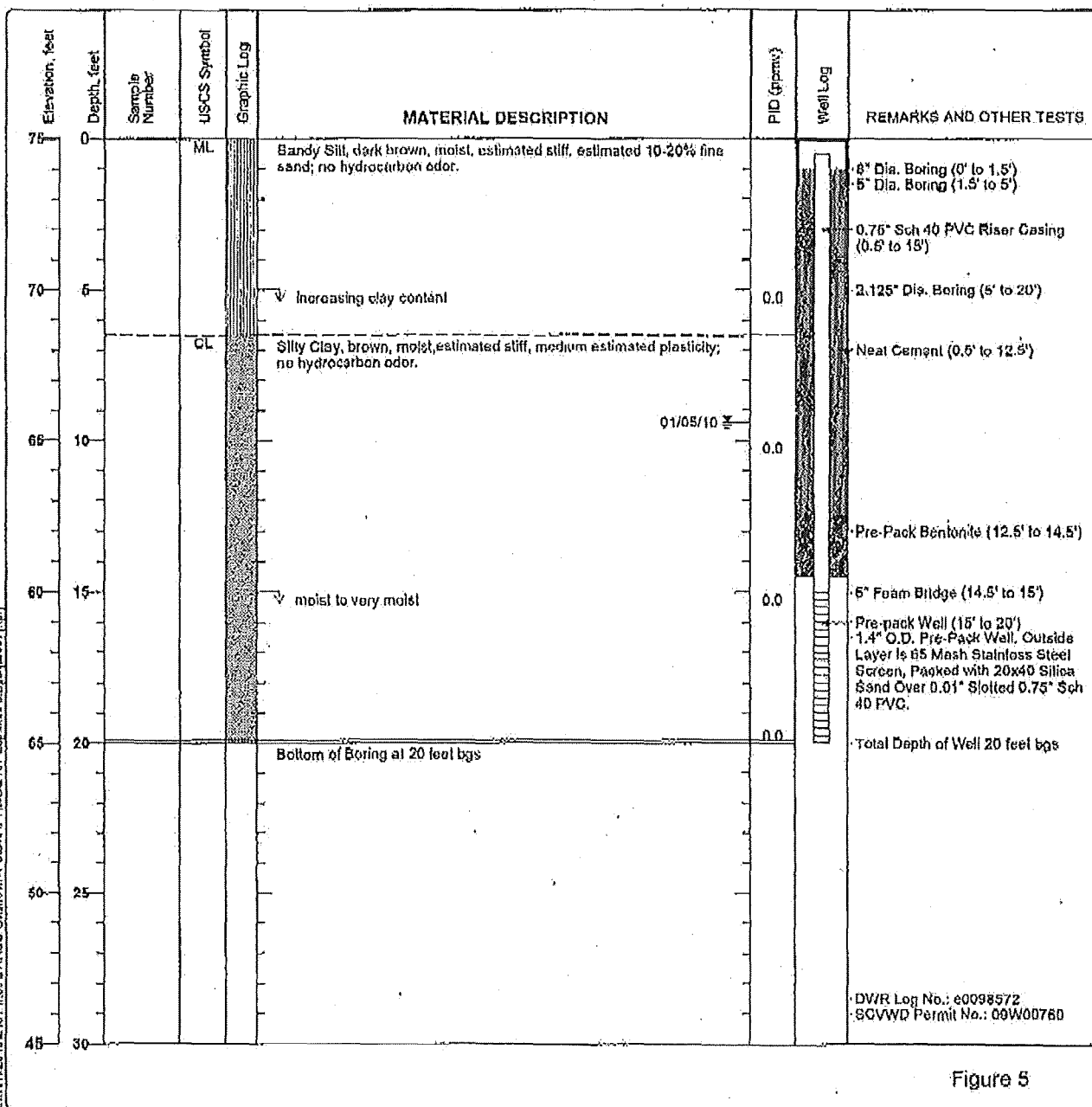
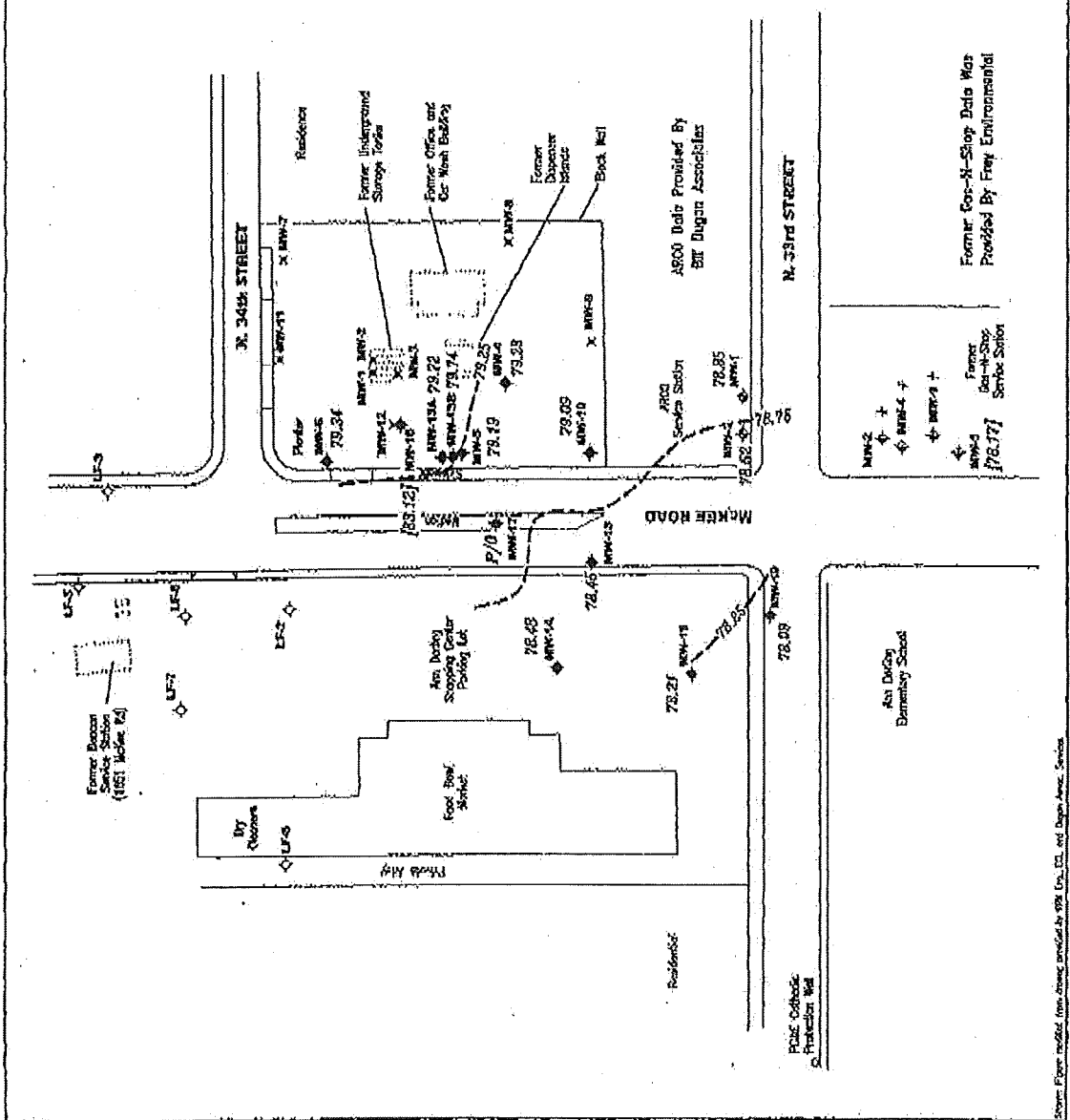
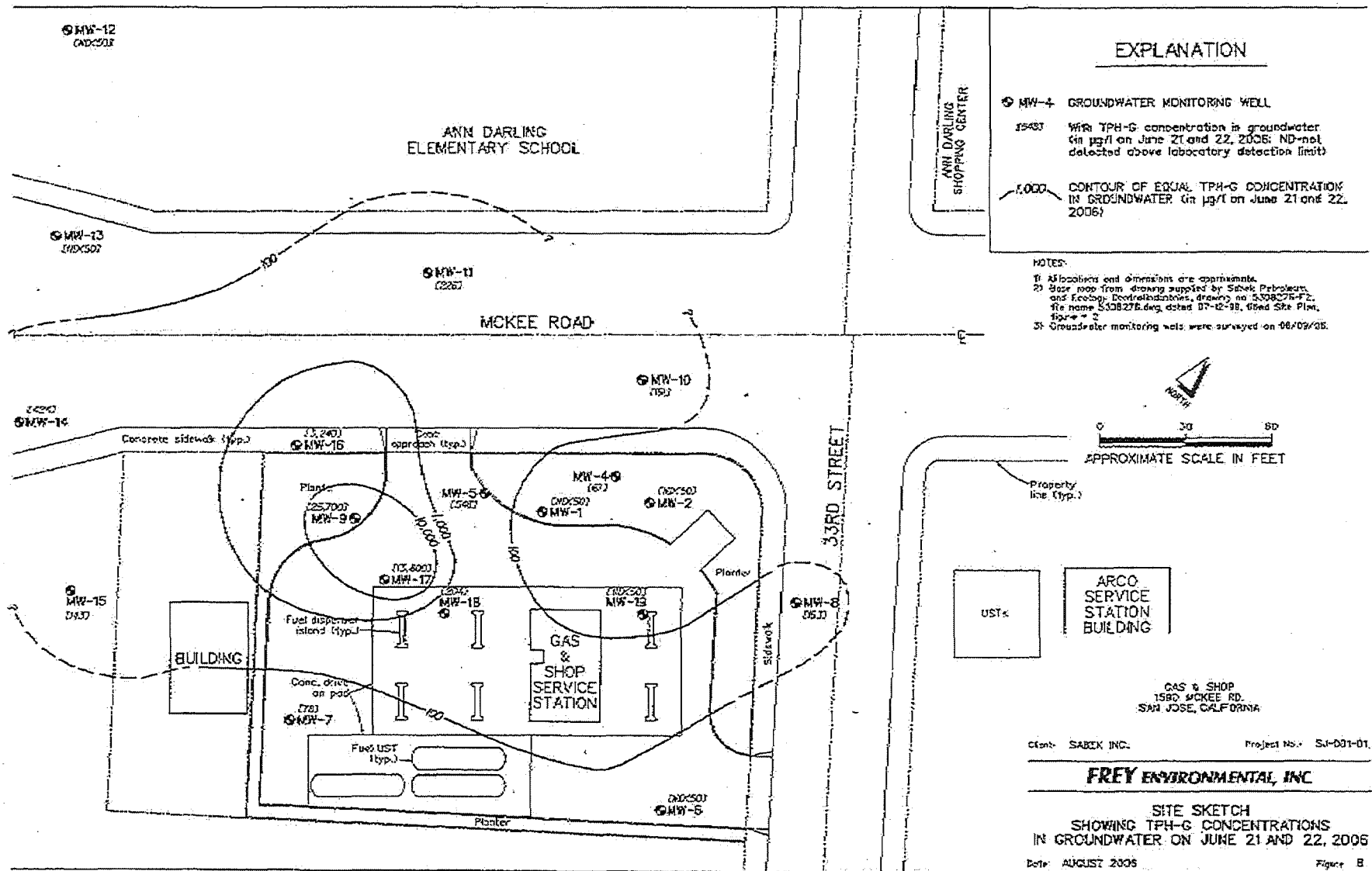


Figure 5

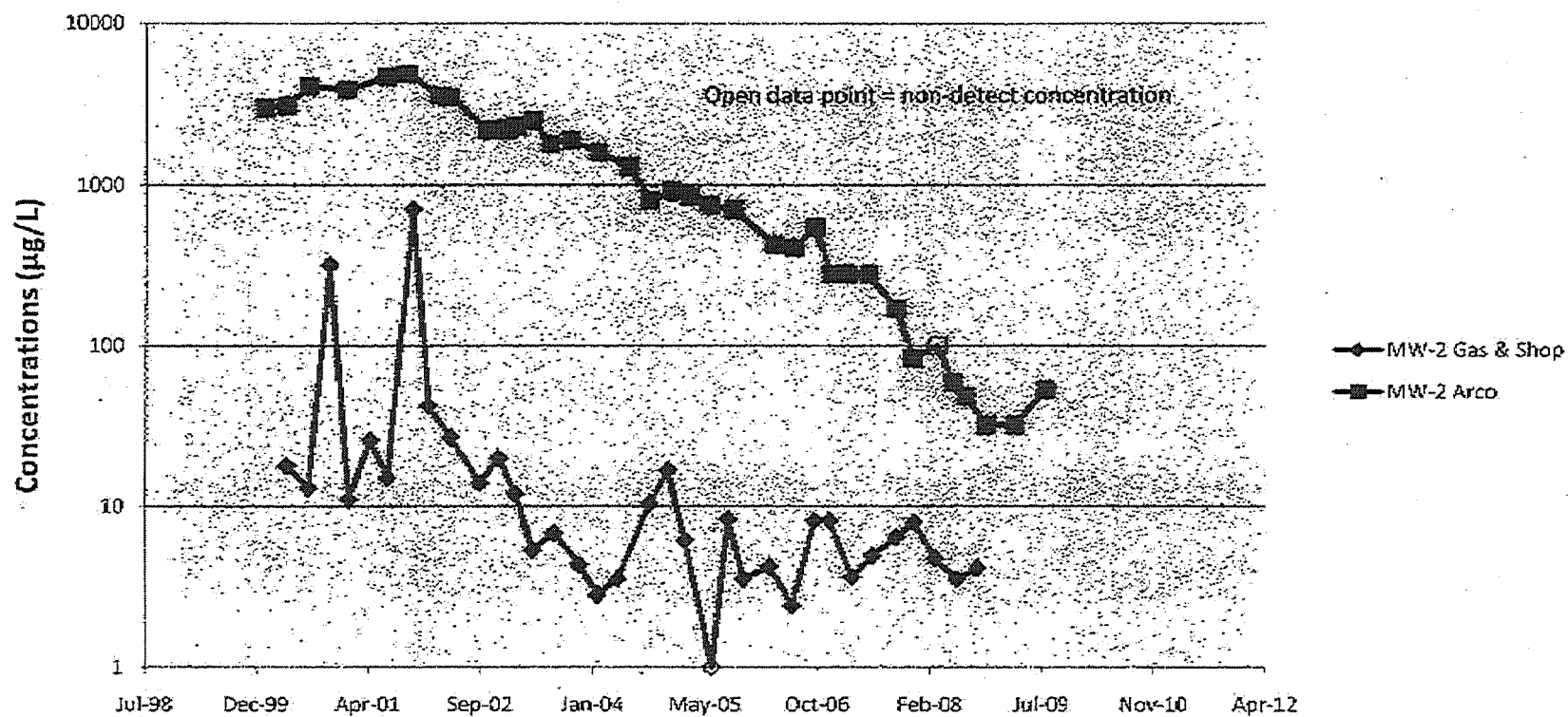
- EXPLANATION**
- ◆ Groundwater monitoring well
 - ◆ Groundwater monitoring well (ARCO)
 - ◆ Groundwater monitoring well (Former Gas-N-Shop)
 - ◇ Groundwater monitoring well (Former Gascon)
 - × Abandoned well
 - \$8.96 Groundwater elevation in feet referenced to Mean Sea Level
 - Groundwater elevation contour, dashed where inferred
 - [99.99] Not used in contouring
 - P/O Paved Over
 - + TOC not available
- Approximate groundwater flow direction of 0.003 to 0.007 ft/ft

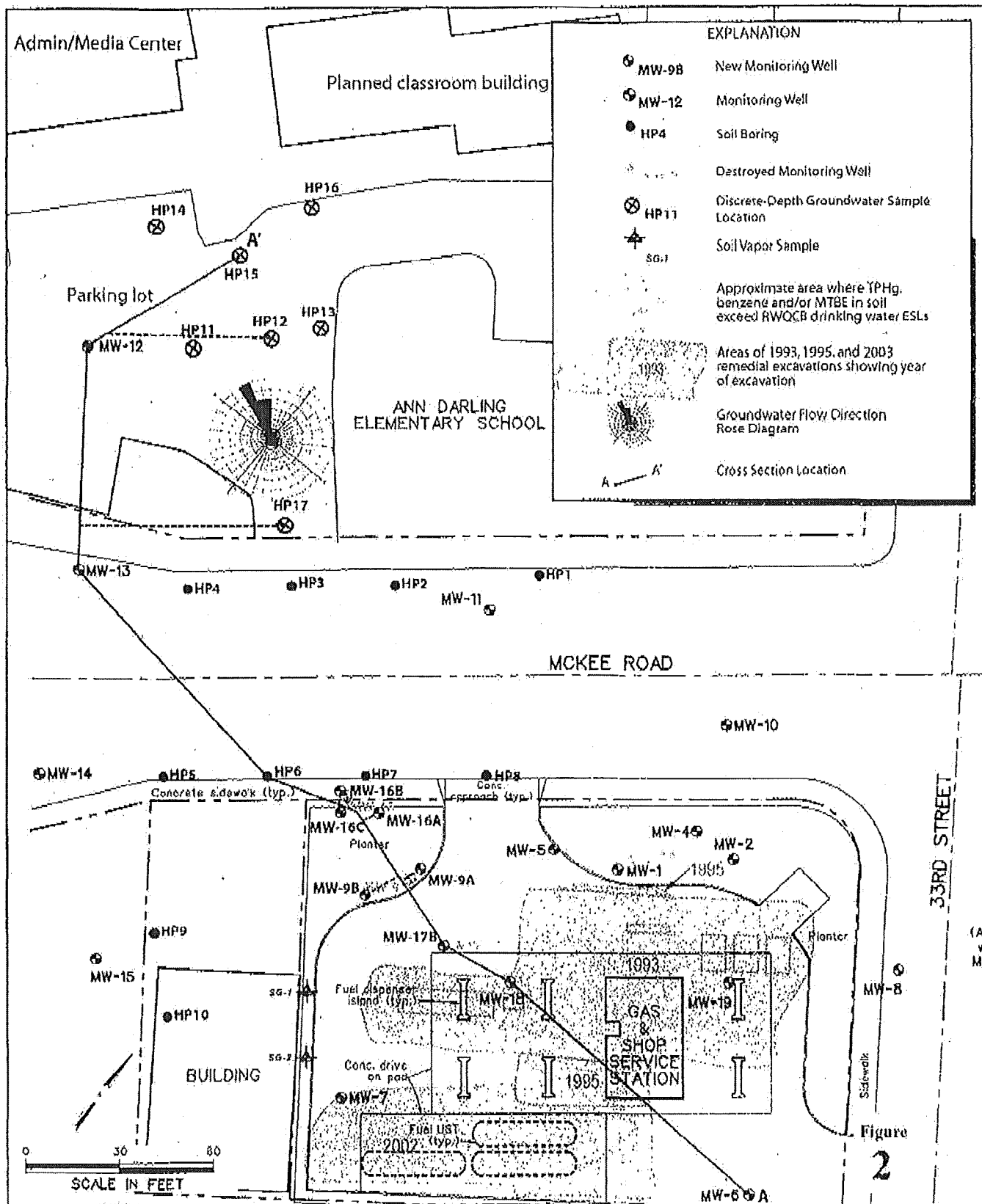




SJ-001-01/SJ-00101-14.dgn

MTBE Concentrations in Arco and Gas & Shop MW-2





Gas & Shop
1590 McKee Road
San Jose, California



Locations of New Wells, Borings,
Soil Vapor Sampling Points
and Destroyed Wells

Subj: Re: Andy's BP v. San Jose/Shirazi
Date: 10/14/2011 3:45:18 P.M. Pacific Daylight Time
From: Jdomski@aol.com
To: Margo.Laskowska@sanjoseca.gov
CC: gwesley00@yahoo.com, tsaberi@aol.com

Ms Laskowska,

We have obtained evidence, as depicted in the attached photographs, that the City, in concert with Mr. Shirazi, has openly violated the Court's Order prohibiting work on the project until the EIR is approved by the Court.

Mr. Shirazi has violated the Court Order by substantial repair on his garage, expansion of his convenience store, allowing cars to use the driveways, repairing the new pumps, etc.— all of which is prohibited by the Court Order.

This conduct clearly also violates the condition for issuance of the CUP that requires that Shirazi comply with all state and local laws.

It is clear from the City's records that no permit has been issued allowing Mr. Shirazi to conduct the activities described herein.

In fact, there is no indication in the record that Mr. Shirazi resubmitted a permit application after the TRO was vacated by the Court and after Mr. Horwedel said under penalty of perjury that the permit had been revoked. The record shows that notwithstanding Mr. Horwedel's sworn testimony, he later approved the permit, even though the permit had been revoked. Such duplicity reveals further evidence that the City is in concert with Mr. Shirazi to violate the letter and spirit of the Court Order in this case.

This is a meet and confer attempt to demand that the City take immediate action to comply with the Court Order by prohibiting Mr. Shirazi from the conduct described and documented herein.

Please respond to this request by Monday, October 17, 2011. It is also requested that the hearing on Shirazi's EIR be postponed until such time as the City and Mr. Shirazi respond to this request. In addition, this is notice that if necessary appropriate Court intervention will be sought.

Jim Dombroski

In a message dated 8/23/2011 9:53:14 A.M. Pacific Daylight Time,
Margo.Laskowska@sanjoseca.gov writes:

Mr. Dombroski:

As I confirmed to the Court at the hearing on Friday, August 19, the permit to which you refer was revoked. It remained revoked while the TRO was in force.
Thank you.

Margo Laskowska

From: Jdomski@aol.com [mailto:Jdomski@aol.com]
Sent: Monday, August 22, 2011 4:14 PM
To: Laskowska, Margo
Cc: gwesley00@yahoo.com; tsaberi@aol.com
Subject: Fwd: Andy's BP v. San Jose/Shirazi

Ms.Laskowska,

EXHIBIT C

Friday, October 14, 2011 AOL: Jdomski

Presumably, Judge Huber discharged the OSC and denied the restraining order based upon the sworn testimony of Mr. Horwedel that "... the Planning Department retroactively rejected the Development Permit Adjustment Application." (Declaration at 3:20-21). As you may recall, I brought this testimony by Mr. Horwedel to Judge Huber's attention during oral argument at the hearing on 8/19/11.

Given Mr. Horwedel's testimony, it reasonably appears that Mr. Shirazi does not have a permit for continuing any work on the subject property, notwithstanding Judge Huber's ruling of this afternoon.

As addressed in my earlier email, Mr. Shirazi initiated work this morning before Judge Huber issued his ruling this afternoon.

In an effort to avoid a further Court hearing before Judge Huber, please confirm that the City has not issued another permit to Mr. Shirazi for any work on the subject property, after Mr. Horwedel signed his declaration. If not, please indicate whether the City will take any steps to halt Mr. Shirazi from any such work unless and until Mr. Shirazi obtains a permit.

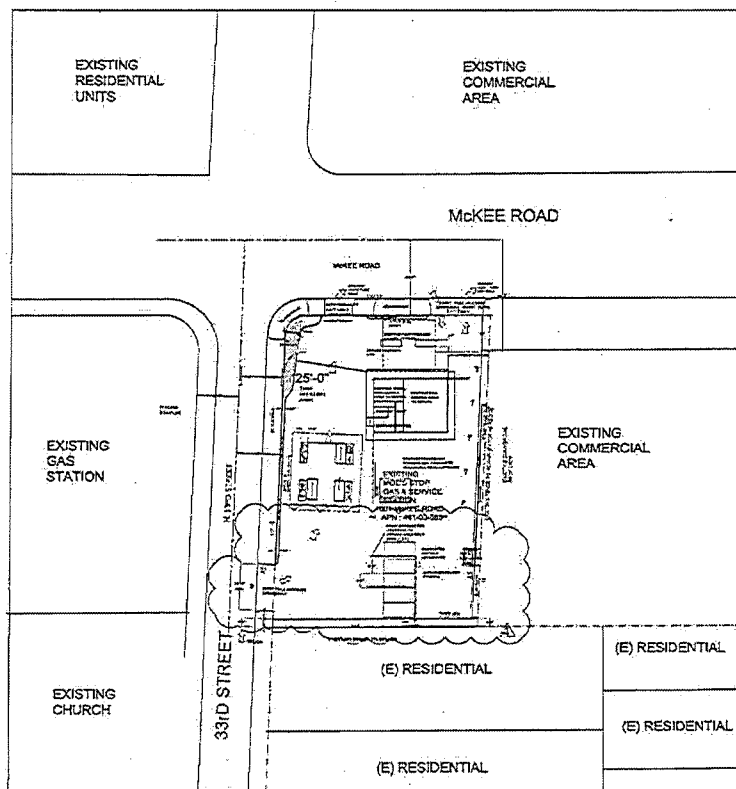
Thank you for a prompt response.

Jim Dombroski

James M. Dombroski, Esq.
Law Offices of James M. Dombroski
P.O. Box 751027
Petaluma, CA 94975-1027
Telephone: (707) 762-7807
Fax: (707) 769-0419
Email: jdombroski@aol.com

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Friday, October 14, 2011 AOL: Jdombroski

[illegible]

EXISTING LAND USE MAP
SCALE: 1" = 30'-0"



PROJECT DESCRIPTION	
LOT 548 (40% INTEREST)	BLVD. HILL (CONTRACT)
PROPOSED PARKING SPACES	4 TOTAL:
EXISTING PARKING SPACES	2 PARKS
PROPOSED ADDITION	2 PARKS
TOTAL COMMENTS	
PROPOSED FLOOR AREA RATIO	
PERMITTED MAXIMUM FLOOR AREA	2,314 SQ. FT.
PROPOSED ADDITIONAL IMPROVEMENTS REQUESTED	A VULNERABILITY ANALYSIS
<p>ON 05/08/2015 THE PLANNING COMMISSION VOTED TO GRANT THE PROPOSED IMPROVEMENTS, PARKING SPACES IMPROVEMENTS IMPROVEMENTS IMPROVEMENTS IMPROVEMENTS</p>	
CITY OF SAN JOSE LOCAL ORDINANCES AND ORDINANCES	

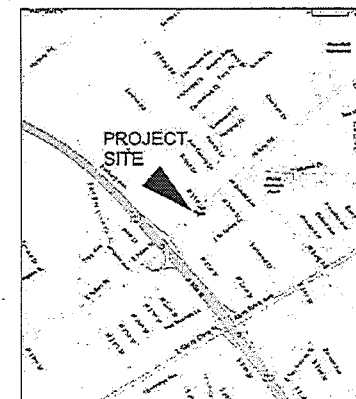
SCOPE OF WORK

1. THE PROPOSED PROJECT CONSIST OF THE REMOVAL OF THE EXISTING RESIDENTIAL STRUCTURE ON APN 44-00-017 AND THE EXPANSION OF THE EXISTING GAS AND SERVICE STATION INTO THE RESIDENTIAL PROPERTY PROPERTY (BANK DRIVE). THE CONSTRUCTION OF PARKING FOR THE PROPERTY ON APN 44-00-017 COMMERCIAL ZONE ON THE SAME ZONING AS THE EXISTING STATION WAS APPROVED ON FEB. 23RD 2009. PROJECT
2. EXPAND THE GAS STATION TO PROVIDE 3 MORE ADDITIONAL GAS PUMPS AND A CANNOPY FOR THE NEW PUMPING FACILITY.
3. RELOCATE THE DRIVEWAY INTO THE STATION ON 23RD STREET SIDE TO ACCOMMODATE THE NEW TRANSIT ENTRY AND EXIT.

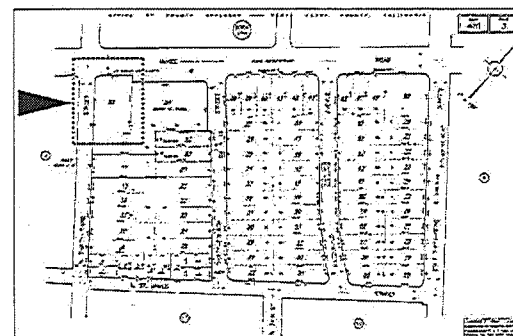
SHEET INDEX

T1	TITLE SHEET, PROJECT INFORMATION AND LOG
A1	EXISTING WITH PLAN AND NEW SITE PLAN
A2	PLANNED SITE PLAN
A3	ENVIRONMENTAL PHOTO
C1	LANDSCAPING PLAN
C2	GRADING AND DRAINAGE PLANS
C3	SWEST DRAIN
C4	WATERWAYS AND DRAINAGE PLAN
C5	IRRIGATION CONTROL PLAN

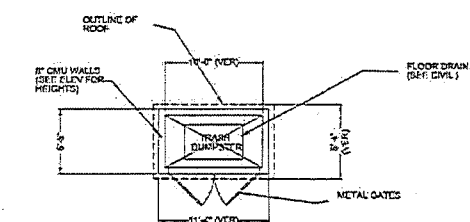
VICINITY MAP



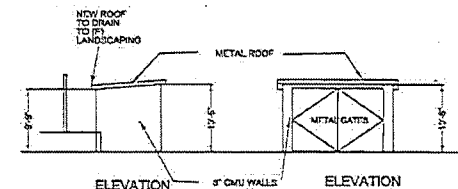
PARCEL MAP



CP11-049



ENLARGED PLAN



TRASH ENCL. DETAIL



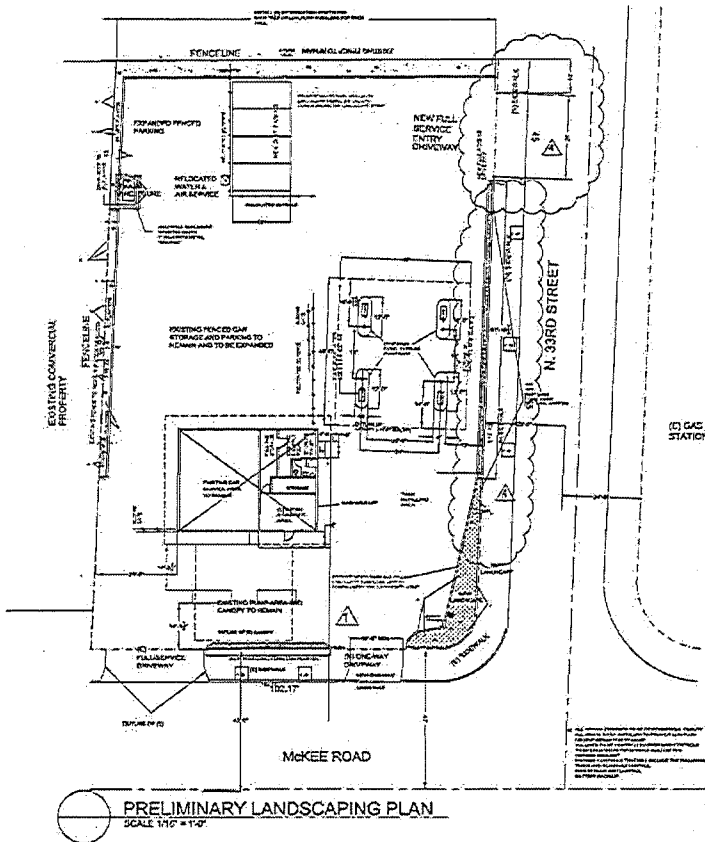
PHOTO 2

CP11-049

**PROPOSED EXPANSION OF MOE'S
STOP GAS AND SERVICE STATION**

1934 MARFAC RD., SAN JAY, CA 95161-1233

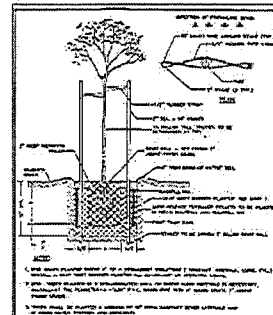
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PLANT	QUANTITY	REMARKS	CONTRACTOR	CALLING	NOTES
A	10	Platanus	10	1	
B	10	Platanus	10	1	
C	10	Platanus	10	1	
D	10	Platanus	10	1	
E	10	Platanus	10	1	
F	10	Platanus	10	1	
G	10	Platanus	10	1	
H	10	Platanus	10	1	
I	10	Platanus	10	1	
J	10	Platanus	10	1	
K	10	Platanus	10	1	
L	10	Platanus	10	1	
M	10	Platanus	10	1	
N	10	Platanus	10	1	
O	10	Platanus	10	1	
P	10	Platanus	10	1	
Q	10	Platanus	10	1	
R	10	Platanus	10	1	
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V	10	Platanus	10	1	
W	10	Platanus	10	1	
X	10	Platanus	10	1	
Y	10	Platanus	10	1	
Z	10	Platanus	10	1	

PLANT NOTES:

1. THE CONTRACTOR SHALL VERIFY PLANT QUANTITIES FROM THE PLANTING PLAN. QUANTITIES SHOWN IN THE LEGEND ARE FOR CONFORMANCE ONLY.
2. NOTIFY THE OWNER/ARCHITECT IMMEDIATELY IN THE EVENT OF ANY DISCREPANCIES BETWEEN ACTUAL SITE CONDITIONS AND THE PLANTING PLAN.
3. PLANT GROUND COVER IN DRIVE AREAS AS NOTED. USE TRIANGULAR SPACING.
4. SEE DETAIL AND SPECIFICATION SHEETS FOR ADDITIONAL INFORMATION.
5. THERE SHALL BE NO MATCHES OR PLANT MATERIAL SUBSTITUTIONS WITHOUT APPROVAL OF THE OWNER OR THE LANDSCAPE ARCHITECT.
6. ALL SLOPED PLANTING WITH LUMEN NOT TO EXCEED A 3:1 SLOPE. ALL SLOPES PLANTED WITH GROUND COVER NOT TO EXCEED A 2:1 SLOPE.
7. PROVIDE POSITIVE DRAINAGE AWAY FROM ALL BUILDINGS AND DRIVE.
8. IN THE EVENT OF ANY DISCREPANCIES BETWEEN THIS PLAN AND ACTUAL SITE CONDITIONS, THE LANDSCAPE ARCHITECT IS TO BE NOTIFIED IMMEDIATELY.
9. EXISTING SITE IS TO BE ROUGH GRADED BY THE GRADING CONTRACTOR TO WITHIN 1/8" TOLERANCE OF FINISH GRADE. LANDSCAPE CONTRACTOR IS TO FINE GRADE ALL LANDSCAPE AREAS.
10. ALL SITE UTILITIES ARE TO BE PROTECTED DURING CONSTRUCTION. IN THE EVENT OF CONFLICT BETWEEN THE PLANS AND UTILITIES THE CONTRACTOR SHALL NOTIFY THE LANDSCAPE ARCHITECT. ANY DAMAGE TO UTILITIES, STRUCTURES, OR OTHER FEATURES TO REMAIN AND CAUSED BY THE LANDSCAPE CONTRACTOR SHALL BE REPLACED OR REPAIRED BY THE CONTRACTOR AT NO EXPENSE TO THE OWNER.
11. THE WORK IN THESE DRAWINGS AND SPECIFICATIONS MAY RUN CONCURRENTLY WITH WORK BY OTHERS. THE LANDSCAPE CONTRACTOR SHALL COORDINATE HIS WORK WITH OTHER CONTRACTORS.
12. REFER TO CIVIL ENGINEER'S PLAN FOR EXISTING SITE GRADING AND DRAINAGE.
13. PRIOR TO ANY DIGGING, CALL UNDERGROUND SERVICE ALERT 1-800-802-2244.



CP11-049

ZAMORA
and
ASSOCIATES
ARCHITECTS, ENGINEERS, PLANNERS
1001 BUIE ROAD, SUITE 100
SAN JOSE, CA 95128
(408) 281-1111

SOUTH VALLEY CONSTRUCTION
1001 BUIE ROAD, SUITE 100
SAN JOSE, CA 95128
(408) 281-1111

GENERAL NOTES:

1. THE CONTRACTOR SHALL VERIFY PLANT QUANTITIES FROM THE PLANTING PLAN. QUANTITIES SHOWN IN THE LEGEND ARE FOR CONFORMANCE ONLY.
2. NOTIFY THE OWNER/ARCHITECT IMMEDIATELY IN THE EVENT OF ANY DISCREPANCIES BETWEEN ACTUAL SITE CONDITIONS AND THE PLANTING PLAN.
3. PLANT GROUND COVER IN DRIVE AREAS AS NOTED. USE TRIANGULAR SPACING.
4. SEE DETAIL AND SPECIFICATION SHEETS FOR ADDITIONAL INFORMATION.
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6. ALL SLOPED PLANTING WITH LUMEN NOT TO EXCEED A 3:1 SLOPE. ALL SLOPES PLANTED WITH GROUND COVER NOT TO EXCEED A 2:1 SLOPE.
7. PROVIDE POSITIVE DRAINAGE AWAY FROM ALL BUILDINGS AND DRIVE.
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**PROPOSED EXPANSION OF MOE'S
STOP GAS AND SERVICE STATION**
1001 BUIE ROAD, SAN JOSE, CA 95128

SHEET TITLE

**PROPOSED LANDSCAPE
SHEET**

REVISIONS

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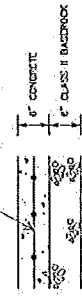
DATE: OCT. 15, 2011
SCALE: NOTED
DRAWN BY: VMD
JOB NO.

L1

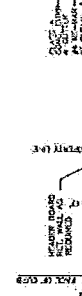
SHEET NO.

GENERAL NOTES

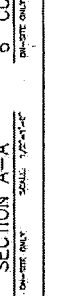
1. ALL MATERIALS AND WORKMANSHIP SHALL CONFORM TO THE CITY OF SAN JOSE SPECIFICATIONS, STANDARD SPECIFICATIONS FOR HIGHWAYS, BRIDGES, AND STRUCTURES, AND THE STANDARD SPECIFICATIONS FOR WATERWAYS AND MARINE STRUCTURES, LATEST EDITIONS.
2. CONTRACTOR SHALL MAINTAIN ACCESS TO ALL EXISTING UTILITIES AND STRUCTURES. ANY DAMAGE TO EXISTING UTILITIES OR STRUCTURES SHALL BE REPAIRED AT THE CONTRACTOR'S EXPENSE.
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ON-SITE CONCRETE APRON SECTION
SCALE: 1/2"=1'-0"



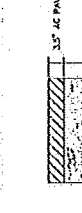
6" CURB DETAIL
SCALE: 1/2"=1'-0"



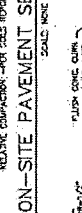
FLUSH CURB DETAIL
SCALE: 1/2"=1'-0"

CITY STANDARD GRADING NOTES

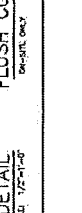
1. All grading is subject to verification by the City Engineer. The City Engineer shall verify the grading within 45 days of the date of the grading plan.
2. The City Engineer shall verify the grading within 45 days of the date of the grading plan.
3. The City Engineer shall verify the grading within 45 days of the date of the grading plan.
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14. The City Engineer shall verify the grading within 45 days of the date of the grading plan.
15. The City Engineer shall verify the grading within 45 days of the date of the grading plan.



ON-SITE PAVEMENT SECTION
SCALE: 1/2"=1'-0"



6" CURB DETAIL
SCALE: 1/2"=1'-0"



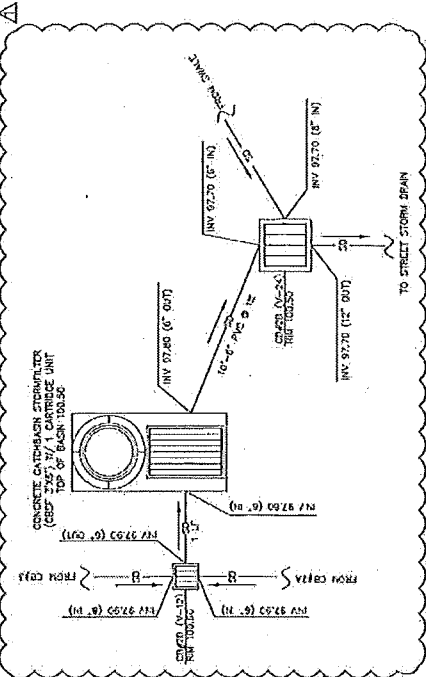
FLUSH CURB DETAIL
SCALE: 1/2"=1'-0"

ABBREVIATIONS

AC	ASPHALT CONCRETE
AD	ADJUSTED
AS	ASBESTOS
CA	CLEARANCE
CD	CONCRETE
CM	CONCRETE MASONRY
CS	CONCRETE SURFACE
CU	CURB
DA	DRAINAGE
DB	DRAINAGE BASIN
DC	DRAINAGE CHANNEL
DE	DRAINAGE ELEVATION
DF	DRAINAGE FLOW
DG	DRAINAGE GRADING
DH	DRAINAGE HATCH
DI	DRAINAGE INLET
DJ	DRAINAGE JUNCTION
DK	DRAINAGE KICK
DL	DRAINAGE LIFT
DM	DRAINAGE MOUNT
DN	DRAINAGE NOT
DO	DRAINAGE OUT
DP	DRAINAGE POINT
DQ	DRAINAGE QUANTITY
DR	DRAINAGE RATE
DS	DRAINAGE SLOPE
DT	DRAINAGE TIME
DU	DRAINAGE UNIT
DV	DRAINAGE VOLUME
DW	DRAINAGE WEIGHT
DX	DRAINAGE WIDTH
DY	DRAINAGE YIELD
DZ	DRAINAGE ZONE

REMARKS

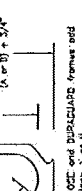
1. The City Engineer shall verify the grading within 45 days of the date of the grading plan.



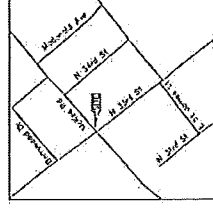
PLAN DETAIL: MEDIA FILTER/STORM DRAIN
SCALE: 1/2"=1'-0"



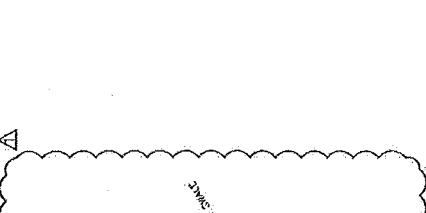
6" CURB DETAIL
SCALE: 1/2"=1'-0"



FLUSH CURB DETAIL
SCALE: 1/2"=1'-0"



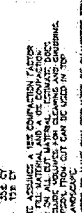
REMARKS



REMARKS



REMARKS



REMARKS



REMARKS

BAY LAND CONSULTING
1140 S. ENTERPRISE DRIVE
SANTA CLARA, CA 95050
(408) 255-0000 FAX (408) 404-5570
SERVING THE BAY AREA

BAYLAND CONSULTING
SAN JOSE, CA 95070
280 NORTH 33RD STREET
APN 481-03-016

REVISIONS

NO.	DATE	DESCRIPTION
1	02/15/12	ISSUED FOR PERMIT

ESTIMATED QUANTITIES

ITEM	QUANTITY
CONCRETE	12.00
ASPHALT	12.00
ADJUSTED	12.00

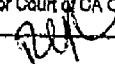
ESTIMATE ASSUMES A 1% COMPLETION FACTOR
FOR ALL MATERIALS AND LABOR. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY PERMITS AND FOR OBTAINING ALL NECESSARY MATERIALS AND LABOR. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY MATERIALS AND LABOR. THE CONTRACTOR SHALL BE RESPONSIBLE FOR OBTAINING ALL NECESSARY MATERIALS AND LABOR.

SHEET INDEX

SHEET	DESCRIPTION
C1	GRADING AND DRAINAGE PLAN
C2	STORMWATER CONTROL PLAN

FILED

MAR 11 2011

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY  DEPUTY

RENÉE ROGERS

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

ANDY'S BP, INC., a California corporation, and
ANDY SABERI, an individual,
Petitioners,

vs.

THE CITY OF SAN JOSE, and DOES 2 through
25,

Respondents,

and

AMIR SHIRAZI, individually and dba MOE'S
STOP, and AMIR SHIRAZI, as Trustee for the
MOHAMMAD M. SHIRAZI LIVING TRUST,

Real Parties in Interest

Case No. 1-10-CV-176412

ORDER RE: PETITION FOR WRIT OF
MANDATE (CEQA)

1 This CEQA matter was heard, argued, and submitted for decision at 9:00 a.m. on March
2 11, 2011 in Dept. 22. In advance of the hearing, the Court carefully reviewed the entire
3 administrative record and all briefs and pleadings in this matter. The Court now orders as
4 follows:

5
6 1) The request for judicial notice of six documents (exhibits A-F), all local legislative
7 materials, by Respondent City of San Jose ("City") is GRANTED pursuant to Evid. Code
8 §452(b).

9
10 2) Petitioners' Petition for Writ of Mandate is GRANTED on the first cause of action,
11 noncompliance with CEQA.

12 Petitioners argue that CEQA has been violated (in part) due to Respondent City's
13 improper rejection of a written traffic report prepared by Traffic Data Service (TDS) in Nov.
14 2009 as not constituting substantial evidence in support of a fair argument that the proposed
15 project may have a significant environmental impact, contrary to the conclusion of the draft
16 Negative Declaration (ND). The TDS report is in the administrative record and was clearly
17 received by both the City's Planning Commission and City Council prior to their final decisions
18 on the proposed project.

19
20 Pursuant to Public Resources Code §21080(c)(2), a *negative declaration* can be prepared
21 when the administrative record does not contain *any* "substantial evidence" supporting a fair
22 argument that a project, as revised to include mitigation, may have significant environmental
23 effects. A *mitigated negative declaration* must be prepared when an initial study identifies
24 potentially significant environmental impacts, but feasible mitigation measures reduce
25 potentially significant effects to a level where clearly no significant impacts may occur.
26
27
28

1 However, there is a statutory preference for resolving doubts in favor of requiring an EIR.

2 *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal App 4th 1095, 1102.

3 Under the “fair argument” standard an EIR *is required* if there is substantial evidence in
4 the whole record that supports a “fair argument” that a project “may” have a significant effect on
5 the environment. CEQA Guideline §15064(f)(1); *No Oil, Inc. v. City of Los Angeles* (1974) 13
6 Cal. 3d 68, 75; *Communities for a Better Environment v. California Resources Agency* (2002)
7 103 Cal App 4th 98, 111-112. “May” in this context means a reasonable possibility. *League of*
8 *Protection of Oakland’s Historic etc Resources v. City of Oakland* (1997) 52 Cal App 4th 896,
9 904-905. Courts have repeatedly affirmed that the fair argument standard is a “low threshold
10 test.” Evidence supporting a fair argument of a significant environmental impact triggers
11 preparation of an EIR regardless of whether the record contains contrary evidence. *League of*
12 *Protection, supra* 12 Cal App 4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202
13 Cal App 3d 296, 310. Whether the administrative record contains a fair argument sufficient to
14 trigger preparation of an EIR is a question of law, not a question of fact, so under this test
15 “deference to the agency’s determination is not appropriate and its decision not to require an EIR
16 can be upheld only when there is no credible evidence to the contrary.” *Sierra Club v. County of*
17 *Sonoma* (1992) 6 Cal App 4th 1307, 1318.

18 CEQA defines “substantial evidence” as including “facts, reasonable assumptions
19 predicated upon facts, and expert opinion supported by facts.” Argument, speculation,
20 inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to
21 environmental impacts are not substantial evidence. Pub. Resources Code §21080(e)(1)(2). The
22 CEQA Guidelines at §15384(a) define “substantial evidence” as (in part) “enough relevant
23 information and reasonable inferences from this information that a fair argument can be made to
24

1 support a conclusion, even though other conclusions might also be reached. . . . Argument,
2 speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or
3 inaccurate, or evidence of social or economic impacts which do not contribute to or are not
4 caused by physical impacts on the environment does not constitute substantial evidence.”

5
6 Even the testimony of area residents who are not qualified experts may qualify as
7 “substantial evidence” when based on personal observations because first-hand lay perceptions
8 are “facts” and “reasonable assumptions based on facts.” Generalized complaints, speculation,
9 and/or unsupported conclusions do not constitute substantial evidence. *Pala Band of Mission*
10 *Indians v. County of San Diego* (1995) 68 Cal App 4th 556. If a factual dispute arises based on
11 credibility of evidence, the lead agency has discretion to determine whether the information has
12 adequate foundation. See *Citizens Committee to Save Our Village v. City of Claremont* (1995)
13 37 Cal App 4th 1157, 1170-71; *Citizens for Responsible Development v. City of West Hollywood*
14 (1995) 39 Cal App 4th 490. However, *the credibility problem must be fact-based and addressed*
15 *by the lead agency during the administrative process.*

16
17
18 A conflict *between* expert opinions over the significance of an environmental impact
19 normally requires that an EIR be prepared. *Pocket Protectors v. City of Sacramento* (2004) 124
20 Cal App 4th 903, 928, citing CEQA Guidelines §15064(g) (“If there is disagreement among
21 expert opinion supported by facts over the significance of an effect on the environment, the Lead
22 Agency shall treat the effect as significant and shall prepare an EIR.”) See also *Friends of the*
23 *Old Trees v. Dept. of Forestry* (1997) 52 Cal App 4th 1383, 1399, n.10, cited by *Pocket*
24 *Protectors* as support for the holding that expert opinion offered under the Fair Argument
25 standard need not meet the standards for expert witnesses testifying at trial. “[T]o carry the
26 proposition of the dissent to its logical extreme is to introduce into the law a principle not
27
28

1 heretofore recognized by any authority, i.e., that in order to raise a fair argument, members of the
2 public must bring forth impeccably credentialed experts who offer scientifically irrefutable, site
3 specific information foretelling certain environmental harm without information supporting a
4 contrary position. To the contrary . . . the evidence supporting a fair argument should not be
5 equated with 'overwhelming or overpowering evidence.' Nor does it have to be uncontradicted."
6 *Id.* at 1402, internal citations omitted.
7

8 The TDS report is an expert opinion supported by facts (in this case traffic measurements
9 taken on identified dates at identified locations and evaluated pursuant to an identified
10 methodology) and is therefore presumptively substantial evidence unless properly discounted
11 based on a lack of credibility. Respondent's rejection of the TDS report was not reasonable and
12 inadequately supported by the record. Substantial evidence from any one qualified person or
13 entity in support of a fair argument that a proposed project may have a significant impact on the
14 environment in one or more of any number of ways (traffic, aesthetics, air quality, etc.) is enough
15 to require the preparation of an EIR.
16
17

18 The City's response to the TDS report, a "supplemental" staff report prepared for the
19 Planning Commission dated April 21, 2010, responding to "timely comments" from Petitioners,
20 was not part of the draft ND circulated to the public for comment. The report does not question
21 TDS' qualifications or its methodology (choice of place or number of measurements, computer
22 program used, etc.). It disagrees with the conclusion reached on the basis that TDS did not
23 consider unidentified "characteristics of peak hour traffic on the US101 corridor, functionality of
24 McKee Road during the peak hours, and general traffic characteristics unique to the project site."
25

26 Courts have taken different positions on the appropriate standard for reviewing a lead
27 agency's decision to adopt a negative declaration after claiming that information offered to show
28

1 a fair argument that a significant impact may occur does not qualify as substantial evidence.
2 Some courts have applied a quasi-independent standard, reviewing the record for substantial
3 evidence supporting a fair argument but deferring to the lead agency on legitimate disputed
4 issues of credibility. See *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29
5 Cal App 4th 1597, 1602. Other courts have indicated that that when an agency concludes that
6 evidence is not believable or reliable, a reviewing court should defer to the agency's
7 determination as long as it is reasonable and is itself adequately supported by evidence in the
8 record. See *Citizens Comm. to Save Our Village v. City of Claremont* (1995) 37 Cal App 4th
9 1157, 1170. See also *Citizens for Responsible Dev. v. City of W. Hollywood* (1995) 39 Cal App
10 4th 490; *Gentry v. City of Murrieta* (1995) 36 Cal App 4th 1359, 1400. A determination that
11 evidence is not credible must be adequately supported by the record. In *County Sanitation Dist.*
12 *No. 2 v. County of Kern* (2005) 127 Cal App 4th 1544, 1597, the court emphasized that before an
13 agency may reject evidence as not credible, it must first identify that evidence with particularity
14 to provide an adequate basis for judicial review. Similarly, in *Pocket Protectors v. City of*
15 *Sacramento* (2004) 124 Cal App 4th 903, 935, the court noted that, to find that the agency
16 resolved disputed factual allegations relating to credibility, the record must show that the
17 decision-maker specifically addressed the issue.

18 Here, even under the stricter standard applied by some courts, the City's rejection of the
19 TDS report as substantial evidence was not reasonable and was inadequately supported by the
20 record. While the Court must "'giv[e] [the lead agency] the benefit of [the] doubt on any
21 legitimate, disputed issues of credibility,'" *Pocket Protectors, supra* at 928, internal citation
22 omitted, the credibility dispute here is not legitimate in the sense that it is *not* based on actual
23 facts in the record. Again, no one challenged TDS' qualifications or methodology, City Staff
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1 simply disagreed with its conclusions and discounted it without adequate explanation (what, for
2 example, are the supposedly unique characteristics of the project site that TDS did not
3 consider?). The City weighed the expert opinion offered by its staff against that offered by
4 project opponents and discounted the expert opinion that stood in the way of its desired goal
5 despite clear authority that a conflict between expert opinions over the significance of an
6 environmental impact normally requires that an EIR be prepared. *Pocket Protectors, supra.*

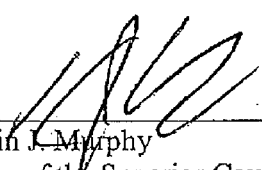
8 Accordingly, when the City issued City Council Resolution No. 75434 denying
9 Petitioners' appeal of the Planning Commission's decision, adopting the MD based on the
10 finding that "there is no substantial evidence in the record that the project will have a significant
11 adverse impact on the environment," and approving the project (the conditional use permit) it
12 failed to proceed in the manner required by law. There is substantial evidence in the
13 administrative record supporting a fair argument that the project in question *may* have a
14 significant adverse impact on the environment, which is the relevant standard. Therefore
15 pursuant to Public Resources Code §21080(d) "an environmental impact report shall be
16 prepared." The Court accordingly orders that Judgment be entered in favor of Petitioners in this
17 proceeding.
18
19

20 Petitioners' second cause of action for declaratory relief is DENIED as unnecessary
21 pursuant to CCP §1061. Petitioners' third cause of action for injunctive relief is DENIED as
22 moot and redundant in light of the Court's finding of a CEQA violation.
23

24 Petitioners are directed to prepare and submit to Respondent City and Real Parties for
25 approval as to form 1) an appropriate form of Judgment granting Peremptory Writ of Mandate
26 and 2) a Peremptory Writ of Mandate, both consistent with this Order. Under Public Resources
27 Code §21168.9(b), this Court will retain jurisdiction over Respondent City's proceedings by way
28

1 of a return to the peremptory writ until this Court has determined that Respondent has complied
2 with CEQA. The parties are directed to meet and confer and communicate to the Court Clerk a
3 proposed return date on the writ
4

5
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7 Dated: 3-11-2011


8 Kevin J. Murphy
9 Judge of the Superior Court
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Law Offices of
JAMES M. DOMBROSKI

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November 1, 2011

Via Email (john.davidson@sanjose.ca.gov)

Mr. John Davidson
Senior Planner
Department of Planning, Building
and Code Enforcement
200 E. Santa Clara Street, 3rd Floor
San Jose, California 95113

Re: City File No. CP11-049 (formerly CP09-115)
Final EIR for Moe's Stop Gas & Service Station

Dear Mr. Davidson:

This office represents Andy Saberi, property owner and business owner, and Andy's BP, Inc., dba Gas & Shop (hereinafter "Andy's BP"), located at the southwest corner of McGee Road, on N. 33rd Street, across the street from Moe's Gas, applicant in the above-referenced proceeding. This office also represents the same parties in the case against the City of San Jose, as Respondent, and Mr. Amir Shirazi, et al., real parties in interest, in the Superior Court of the State of California for the City and County of Santa Clara, Case No. 110 CV 176412. This letter supplements my letter dated October 17, 2011.

The Final EIR should be rejected for the following reasons:

- The Court's Writ of Mandate did not limit the EIR to traffic impact;
- The issue of hazardous materials was raised in the Verified Petition For Writ of Mandate;
- The City's response to evidence of contamination must be rejected because the reports offered by the City are not made under penalty of perjury;
- The Traffic Impact Analysis (TIA) recommendation for an on-site circulation plan is hazardous and will cause an increase in street congestion; and

Mr. John Davidson
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November 1, 2011

- The EIR should be rejected because Mr. Shirazi has violated the Court's Order and the City's Stop Work Order.

1. The Court's Writ of Mandate Did Not Limit the EIR to Traffic Impacts.

At page 38, the First Amendment to the EIR states, "Please note that the Court's Writ of Mandate Required that the EIR evaluate traffic impacts, not hazardous material."

The Judgment Granting Peremptory Writ of Mandate is attached as Exhibit A. The Peremptory Writ of Mandate is attached as Exhibit B.

There is nothing in the Judgment or in the Peremptory Writ that limits the EIR to traffic impacts.

In fact, Judge Joseph H. Huber, on August 19, 2011, ruled that: "... there isn't a thing in that Judgment or (Judge) Murphy's two-page order that speaks to we're doing this because of traffic impact." The transcript of Judge Huber's ruling is attached as Exhibit C.

This means that the EIR is flawed on its face and should be rejected. The EIR should include an evaluation of the hazardous materials. The assertion in the First Amendment to the EIR, at page 39, that this EIR "has been prepared in accordance with requirements contained in the Court's Writ of Mandate" is a false statement. The City of San Jose should make the appropriate correction and delete this false assertion and acknowledge the EIR must include hazardous materials.

2. The Issue of Hazardous Materials Was Raised in the Verified Petition For Writ of Mandate and Properly Before the Court.

The issue of hazardous materials was raised in the Verified Petition for Writ of Mandate, as documented in the Reply Brief, as quoted in the undersigned's letter to Mr. Davidson, dated October 17, 2011, as follows:

On August 13, 2009, the County of Santa Clara sent a letter to Shirazi regarding a fuel leak investigation at Moe's Stop. (SJ 87) The letter refers to the fact that Moe's Station was a site where fuel leaks had occurred, i.e., a "fuel leak site." (SJ 87; emphasis added)

The site of the Project was on the "LUST" (Leading Underground Storage Tanks) list, i.e., a site with issues regarding soil contamination involving leakage of

underground gasoline storage tanks. (SJ 107) At a meeting, Respondent's staff member stated, "...I did some further investigation into it and it appears that there still are kind of issues going on with that, so, basically, as an active-active leaking underground storage tank site, while development on the property can still proceed, it is true that we cannot find this to be exempt from CEQA, so that we—the staff—the applicant would need to do some kind of environmental clearance, either a—you know, a negative declaration or, you know, if required, an EIR." (SJ 107; emphasis added.) Respondent's staff speaker further stated, "...I found, you know, a trail of—I guess he discussed correspondence from the Santa Clara County. I did, I believe, find the same correspondence he did. That was dated from June of this year, so, clearly there's still activity on the site with regard to the — to the leaking underground storage tank. So again, you know, it's not an issue that, you know, this development can't happen, it's just that the exemption will not cover it." (SJ 108-109; emphasis added.)

On March 29, 2010, Respondent, through its representative Avril Baty, executed an initial study indicating that the Project would result in 41 net new average daily trips. (SJ 45) It further indicated that:

"The Municipal Environmental Compliance Officer and the Santa Clara County Department of Environmental Health have reviewed the soils report, and have determined that the groundwater at the site has been impacted by an historic release of gasoline,..." (SJ 41; emphasis added.)¹

On April 14, 2010, a supplemental memorandum was prepared regarding the Project, in relation to information received regarding an issue regarding a leaking underground fuel tank not originally identified by the Fire Department. (SJ 58)

The letter from Petitioners' counsel states that substantial evidence supported the conclusion that significant impacts may occur, and as a consequence, an EIR was mandated. (SJ 65) ["The substantial evidence clearly shows: (1) geology and soils may be impacted based upon applicant's leaking gasoline tanks; (b) hazards and hazardous materials may be impacted based upon applicant's leaking gasoline tanks; and (c) transportation/traffic may be impacted based upon the 'Generation Study' by Traffic Data Service. [p] 'If the Planning

¹ The opposition brief submitted by Respondent Shirazi failed to address the issue of Respondent's admission that "the site has been impacted by an historic release of gasoline." This admission alone is good grounds to require an EIR.

Mr. John Davidson
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November 1, 2011

Commission simply believes an impact may occur, an EIR must be required. Applicable treatises and laws clearly mandate an EIR if an impact may occur. Here, applicant's history of 'out of compliance' with its underground tanks, coupled with the possible leaking, is sufficient to require an EIR. An impact may occur is sufficient to require an EIR. In addition, there can be no doubt based upon the TDS Study that traffic may be impacted. This is sufficient to require an EIR." (SJ 65)).)

On April 21, 2010, a planning commission meeting was held. (SJ 119 et seq.) Based on the report of TDS, Mr. Dombroski argued that the Project would double traffic because Moe's Stop is a origin/destination in and of itself because it has the lowest gasoline prices in the area. (SJ 123) He noted that customers were observed waiting up to 15 minutes in line to use the station, negating the inference that customers arose from driving by the facility alone. (SJ 124) Thomas Saberi further stated at the meeting that Geotracker, a public website, failed to reflect that the site was in compliance with respect to underground gasoline leakage and contamination. (SJ 125) Mr. Saberi requested the commission order an EIR based on issues relating to traffic and contamination from leakage of gasoline. (SJ 125) At the conclusion of the meeting the application for conditional use permit was approved in light of the negative declaration and a finding it was in compliance with CEQA. (SJ 127-128)

Instead of addressing the fact that the issue of hazardous materials was properly before the Court, the City of San Jose ignored this issue and falsely claims the Court's Writ of Mandate required only that the EIR evaluate traffic impacts. As shown above, the City of San Jose is wrong.

The City failed to comply with the Peremptory Writ of Mandate by failing to require that the EIR evaluate hazardous materials. For this reason, the EIR should be rejected.

3. The City's Response to Evidence of Contamination Must Be Rejected Because the Reports Offered by the City are not Made Under Penalty of Perjury.

The City, at page 38 to 39 of the First Amendment to the EIR, rely on the reports in Attachment 1, August 21, 2011 letter from Well Test, Inc., and the August 31, 2011, letter from Well Test, Inc., attached. However, these reports must be rejected. Both reports fall to include perjury statements. The letter to Mr. Moe Shirazi, dated July 28, 2011, from Mr. Gerald O'Regan, PG, Environmental Geologist, Local Oversight Program with the County of Santa Clara (attached as Attachment C), states, in part, as follows:

Mr. John Davidson
Page 5
November 1, 2011

Perjury Statement

All proposals and reports submitted to this office must be accompanied by a cover letter from the responsible party which states, at a minimum, the following:

"I declare, under penalty of perjury, that the information and/or recommendations contained in the attached proposal or report is true and correct to the best of my knowledge."

This letter must be signed by an officer or legally authorized representative of your company. Future submittals made without a perjury statement may be returned as insufficient, which could affect your eligibility for reimbursement from the State Cleanup Fund. (Emphasis added.)

There is no perjury statement submitted by the City which shows that an officer or legally authorized representative of Well Test, Inc., the agent for Mr. Shirazi, or Mr. Shirazi himself, signed the perjury statement regarding the issue of hazardous materials. This is an additional reason for rejecting the EIR.

4. The Traffic Impact Analysis (TIA) Recommendation for an On-Site Circulation Plan is Hazardous and Will Cause An Increase in Street Congestion.

Attached as Exhibit D is a review of the TIA, by Robert I. Harrison, dated October 25, 2011. For the reasons addressed by Mr. Harrison, the TIA should be rejected.

5. The EIR Should Be Rejected Because Mr. Shirazi Has Violated the Court's Order and the City's Stop Work Order.

In the letter to this office dated October 17, 2011, Deputy City Attorney, Ms. Margo Laskowska, stated, in part, "Because the Court specifically indicated that the City should not allow driveway relocation, driveway relocation is not part of that permit adjustment." The letter is attached as Exhibit E.

In the sworn declaration by the San Jose Director of Planning, Mr. Joseph Horwedel, dated August 3, 2011, Mr. Horwedel testified in paragraph 8: "In response to the Court's Amended Temporary Restraining Order dated July 27, 2011, the Planning Department retroactively rejected the Development Permit Adjustment Application." Mr. Horwedel's declaration is attached as Exhibit F. Attached to Mr. Horwedel's declaration is a drawing of the Shirazi project which specifically states: "Driveway relocation 'not' approved with this adjustment subject to CUP for service station."

Mr. John Davidson
Page 6
November 1, 2011

Based upon the above-referenced statements made by the City Attorney Ms. Laskowska, and the sworn statement by Mr. Florwedel, the City of San Jose acknowledged and admitted (1) the Court specifically indicated that the City should not allow driveway relocation, and (2) the driveway relocation is not part of the permit adjustment.

This means that Mr. Shirazi, dba Moe's, must comply with the Court ruling that the driveway relocation is not part of the permit adjustment. Furthermore, Mr. Shirazi must comply with the Stop Work Order, dated March 14, 2011, attached as Exhibit G.

Mr. Shirazi has openly violated the Court's Order prohibiting "driveway relocation" and openly violated the Stop Work Order. This is demonstrated by the photographs taken within the last week, attached hereto as Exhibits H and I. These photographs show that the driveway relocation has been completed by Mr. Shirazi. The photographs show that new driveway installed and that customers are using the "new driveway", all of this while the old driveway remains open.

Mr. Shirazi's application for a CUP must be in compliance with all state and local laws, as a condition for issuance of a CUP, including the Court's Order, as addressed above. As shown, Mr. Shirazi violates both the Stop Work Order and the Court Order.

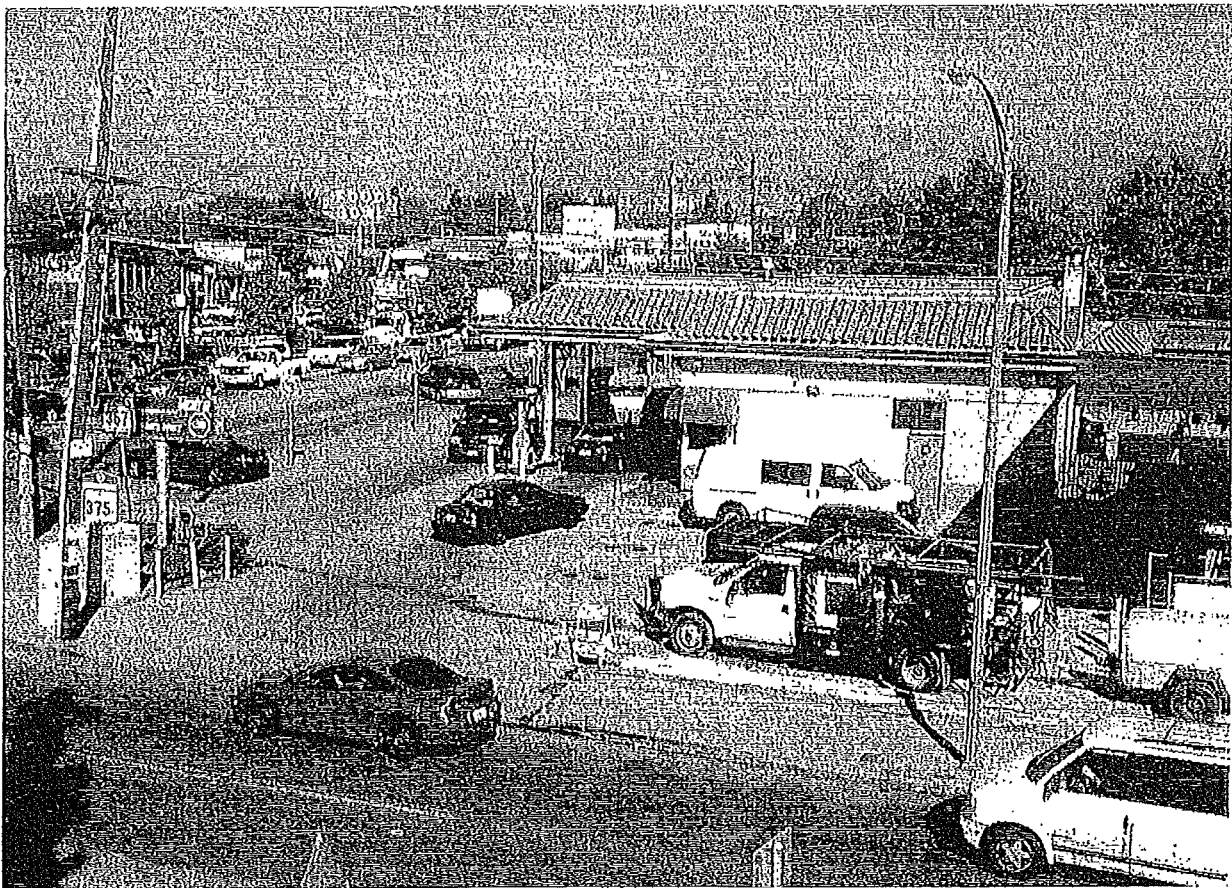
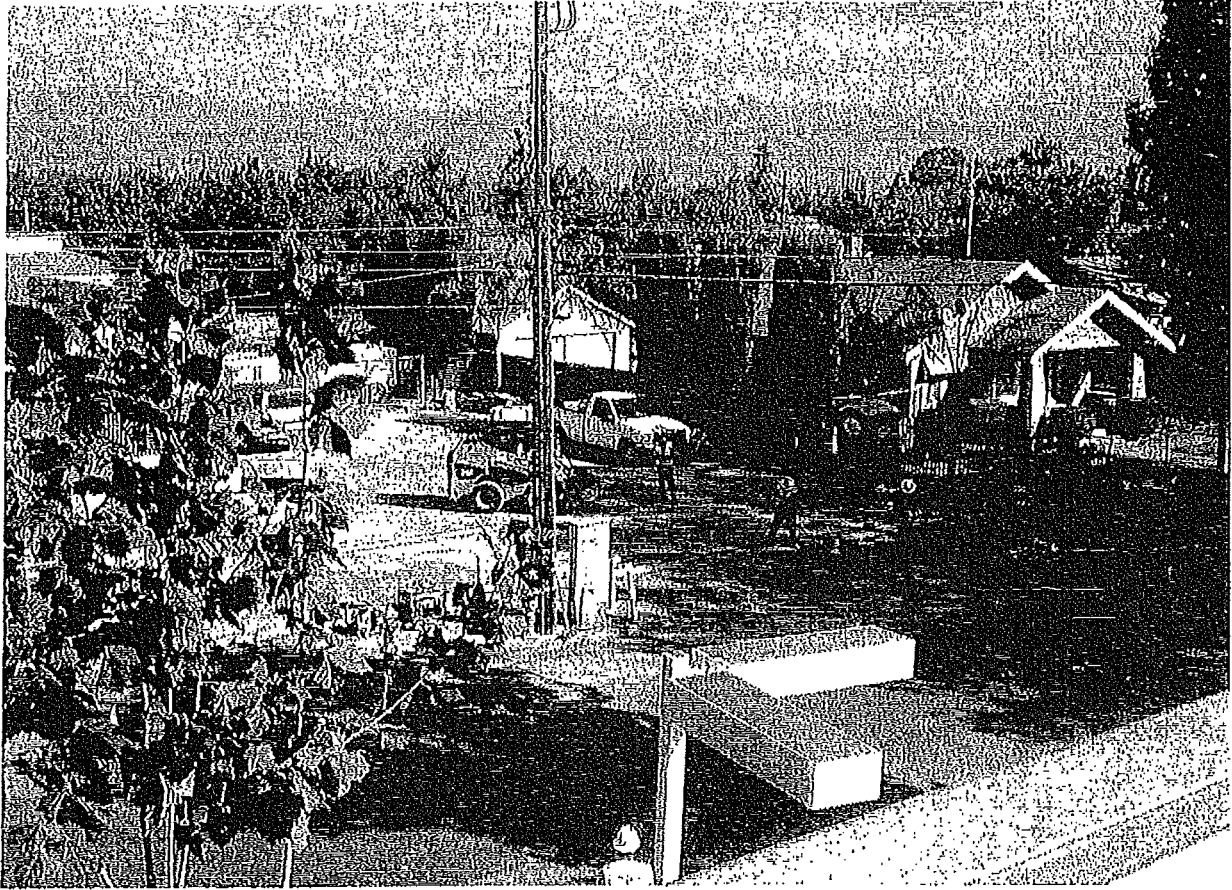
For the above-stated reasons, the EIR should be rejected.

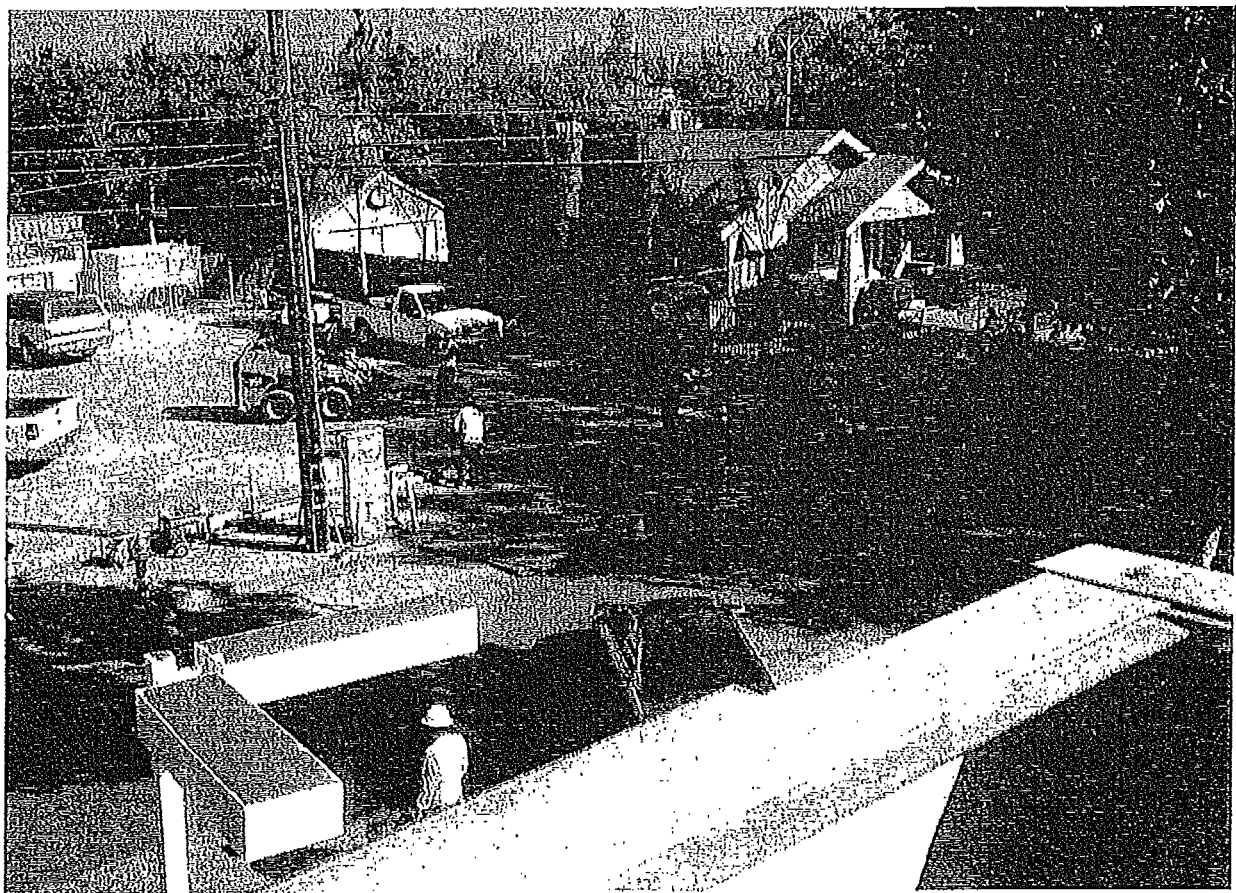
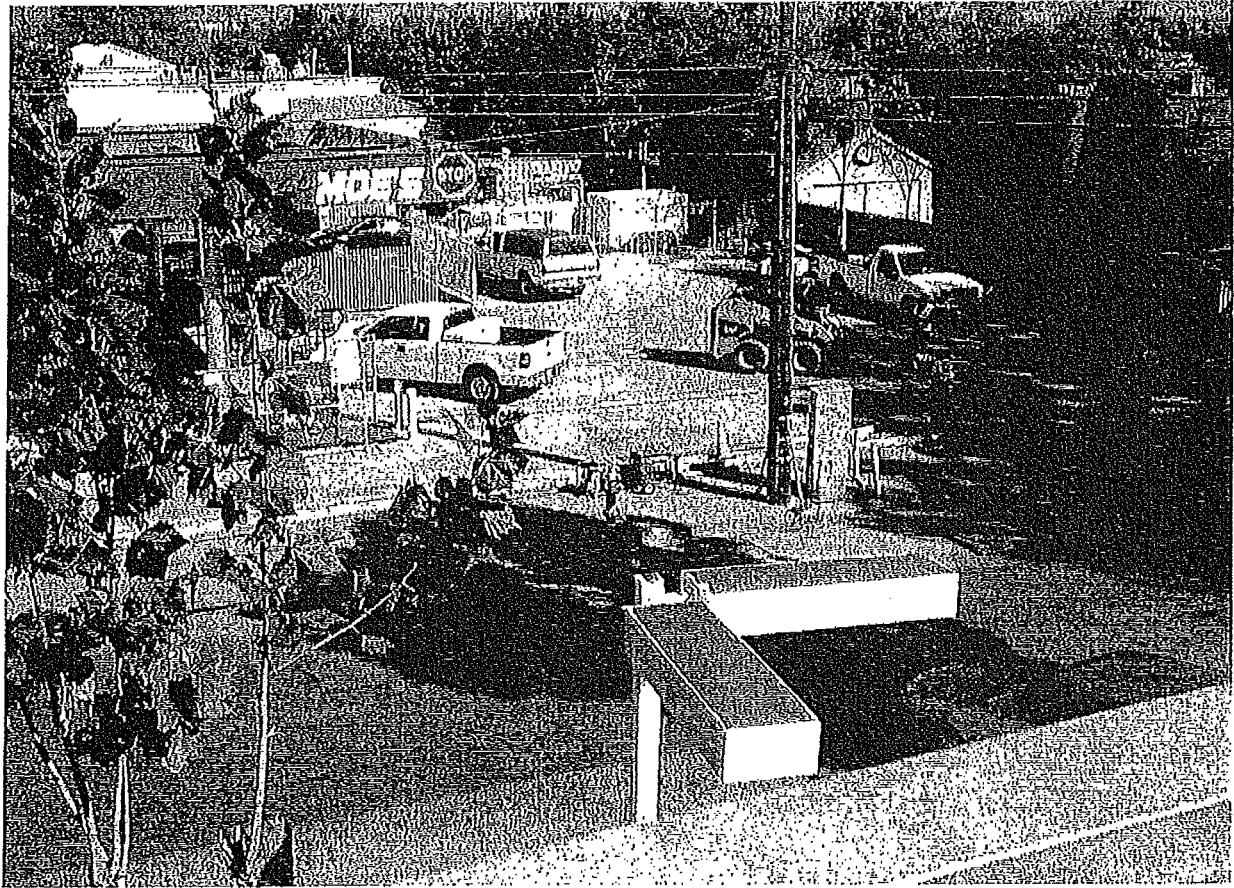
Very truly yours,

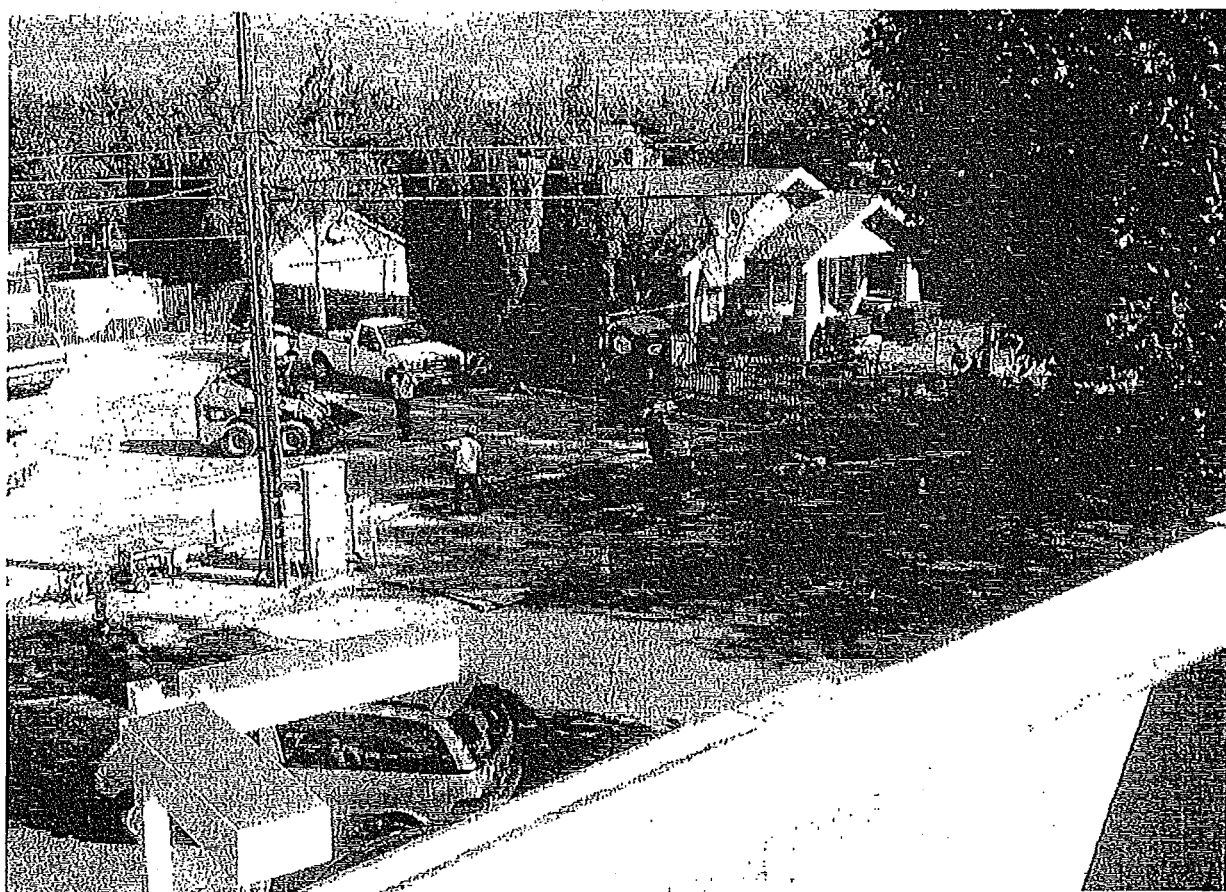


JAMES M. DOMBROSKI

JMD:sd
Enclosures







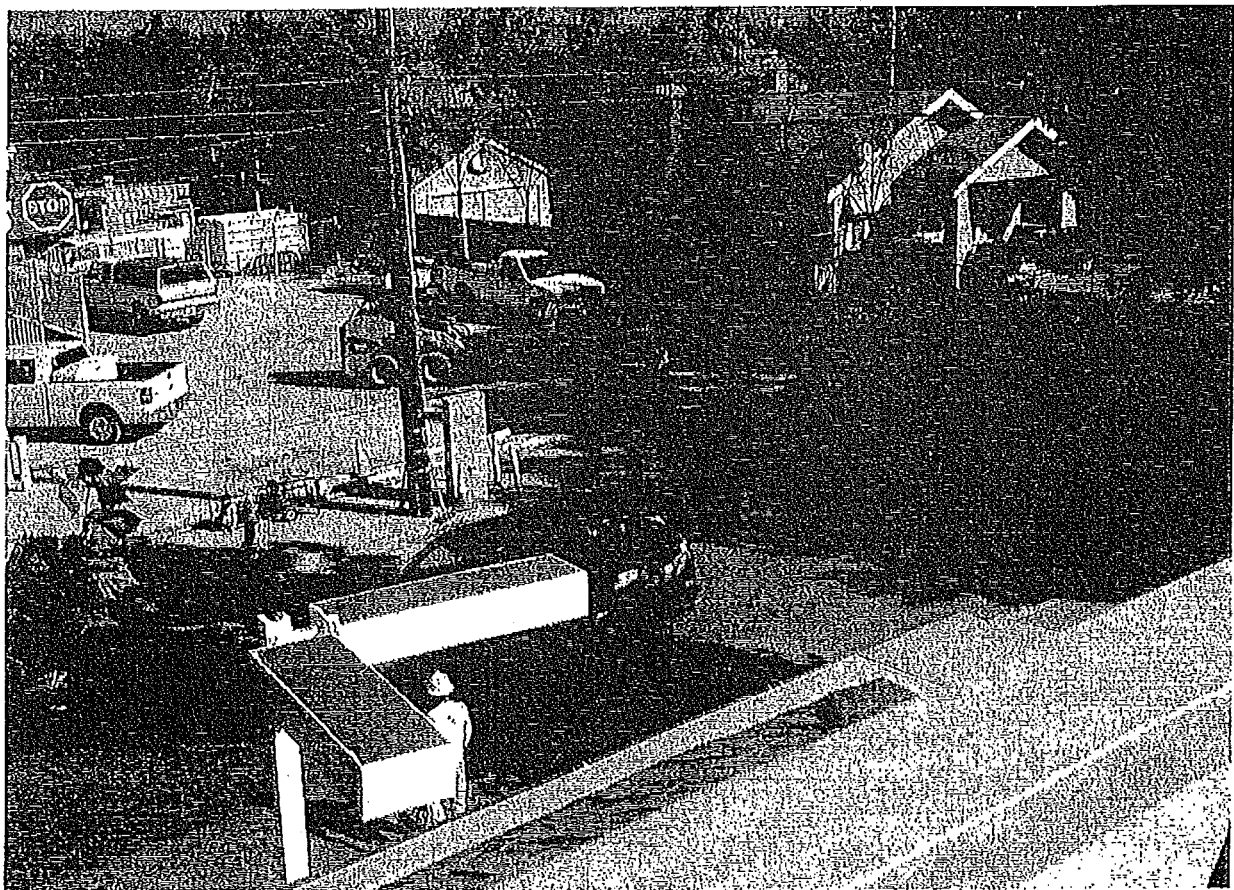
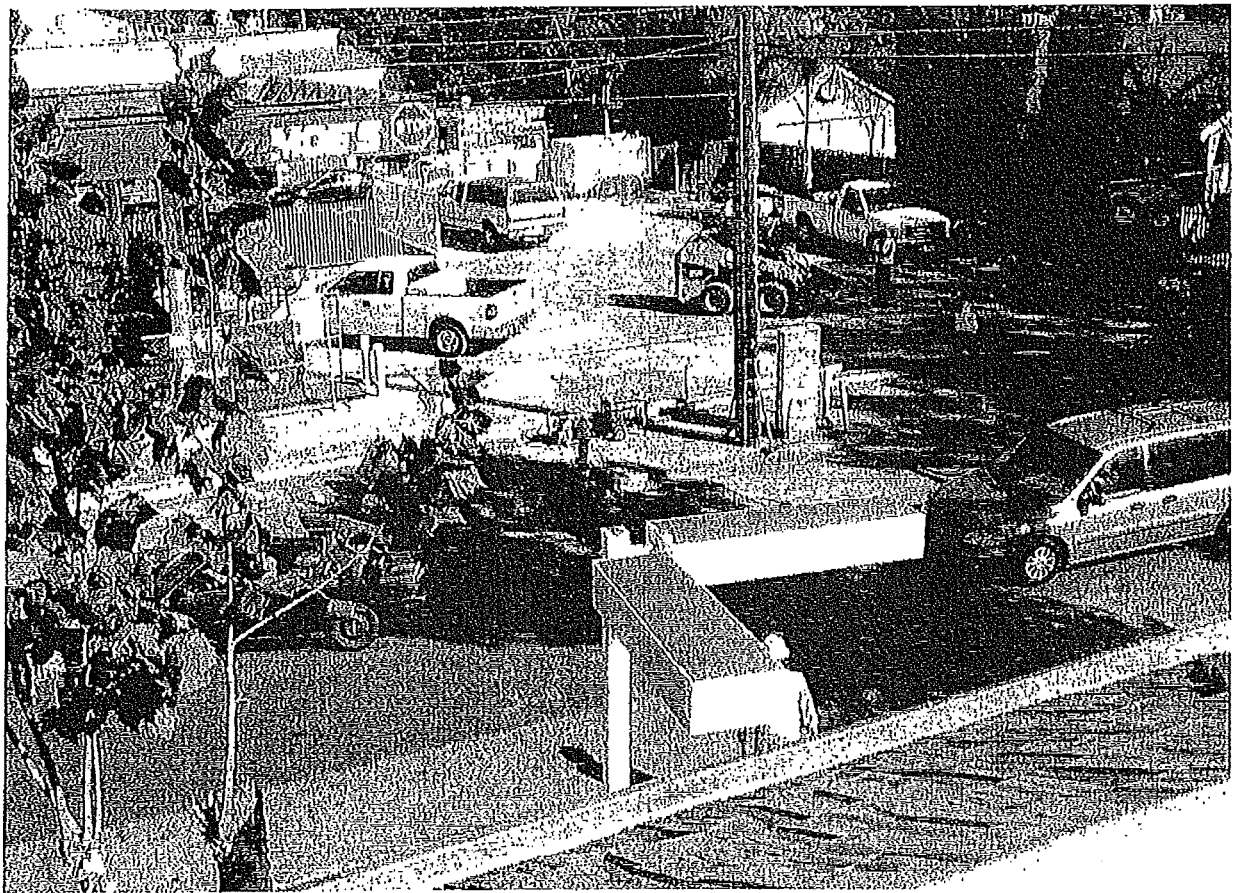












EXHIBIT A

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4 Petaluma, CA 94975
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7 Email: jdomski@aol.com

FILED

MAR 29 2011

8 *Law Offices of*

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11 1045 Airport Boulevard, Suite 100

12 South San Francisco, CA 94080

13 Telephone: (650) 588-2410

14 Facsimile: (650) 873-7046

15 Attorneys for Petitioners

16 ANDY'S BP, INC. and ANDY SABERI

17
18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 FOR THE COUNTY OF SANTA CLARA

20 UNLIMITED CIVIL CASE

21 ANDY'S BP, INC., a California corporation,
22 and ANDY SABERI, an individual,

23 Petitioners,

24 vs.

25 THE CITY OF SAN JOSE, and DOES 2-25,
26 inclusive,

27 Respondents.

28 AMIR SHIRAZI, individually and dba MOE'S
STOP, and AMIR SHIRAZI, as Trustee for the
MOHAMMAD M. SHIRAZI LIVING TRUST,

Real Parties in Interest.

CASE NO. 110cv176412

JUDGMENT GRANTING
PEREMPTORY WRIT OF MANDATE

Assigned CRQA Judge
Hon. Kevin J. Murphy, Department 22
Pursuant to Public Resources Code,
Section 21167.1(b)

1 This matter came on regularly for hearing on March 14, 2011, in Department 22 of this
2 Court, located at 161 North First Street, San Jose, California. James M. Dombroski and Thomas
3 Sabari appeared on behalf of Petitioner Andy's BP, Inc., a California corporation, and Andy
4 Sabari, an individual; Margo Laskowska appeared on behalf of Respondent City of San Jose; and
5 Gary B. Wesley appeared on behalf of Real Parties In Interest, Amir Shirazi, individually and
6 dba Moe's Stop, and Amir Shirazi, as Trustee for the Mohammad M. Shiarzi Living Trust.

7 The Court having reviewed the record of Respondent's proceedings in this matter, the
8 briefs submitted by counsel, and the arguments of counsel; the matter having been submitted for
9 decision, and the Court having issued an order that judgment and a peremptory writ of mandate
10 issue in this proceeding,

11 IT IS ORDERED that:

12 1. Judgment be entered in favor of Petitioners in this proceeding;

13 2. A peremptory writ of mandate directed to Respondent issue under seal of this
14 Court, and ordering Respondent to:

15 a. Set aside and void the San Jose Planning Commission's Resolution No. 10-
16 036 adopting the Negative Declaration and approving the Shirazi Conditional
17 Use Permit No. CP09-015, known as Moe's Stop, located at 1604 McKee
18 Road, San Jose, California (hereinafter "Shirazi CUP");

19 b. Set aside Respondent City Council Resolution No. 75434 Upholding the
20 Planning Commission's Decision to Adopt a Negative Declaration for the
21 Expansion of an Existing Gasoline Service Station of a Site Located on the
22 Southeast Corner of McKee Road, San Jose, and 33rd Street;

23 c. An environmental impact report shall be prepared, pursuant to Public
24 Resources Code § 21080(d);

25 d. Respondent is further ordered to suspend all activities of the Shirazi CUP, as
26 defined in the Verified Petition for Writ of Mandate at page 4:3-8, that could
27 result in an adverse change or alteration to the physical environment until
28 completion of the environmental impact report and until Respondent has

1 brought its determination, finding or decision into compliance with the
2 requirements of CEQA.

3 3. This Court will retain jurisdiction over Respondent's proceedings by way of a
4 return to the peremptory writ of mandate until the Court has determined that Respondent has
5 complied with the provisions of CEQA;

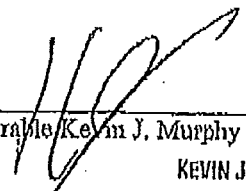
6 4. Petitioners' second cause of action for declaratory relief is denied as unnecessary
7 pursuant to CCP § 1061;

8 5. Petitioners' third cause of action for injunctive relief is denied as moot and
9 redundant in light of the Court's finding of a CEQA violation;

10 6. This Court will retain jurisdiction to determine entitlement to attorney's fees;

11 7. Petitioners shall be awarded its costs of suit.

12 DATED: March 2nd, 2011.

13
14 
Honorable Kevin J. Murphy

15 KEVIN J. MURPHY
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EXHIBIT B

1 JAMES M. DOMBROSKI (CSBN 56898)
2 LAW OFFICE OF JAMES M. DOMBROSKI
3 Post Office Box 751027
4 Petaluma, CA 94975
5 Telephone: (707) 762-7807
6 Facsimile: (707) 769-0419
7 Email: jdombroski@aol.com

8 *Law Offices of*
9 WILLIAM H. PAYNTER
10 THOMAS I. SABERI, ESQ. (CSBN 169652)
11 1045 Airport Boulevard, Suite 12
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13 Telephone: (650) 588-2428
14 Facsimile: (650) 873-7046

15 Attorneys for Petitioners
16 ANDY'S BP, INC. and ANDY SABERI

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28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA
UNLIMITED CIVIL CASE

ANDY'S BP, INC., a California corporation,
and ANDY SABERI, an individual,

Petitioners,

vs.

THE CITY OF SAN JOSE, and DOES 2-25,
inclusive,

Respondents.

AMIR SHIRAZI, individually and dba MOE'S
STOP, and AMIR SHIRAZI, as Trustee for the
MOHAMMAD M. SHIRAZI LIVING TRUST,

Real Parties in Interest.

CASE NO. 110cv176412

PEREMPTORY WRIT OF MANDATE

Assigned CEQA Judge
Hon. Kevin J. Murphy, Department 22
Pursuant to Public Resources Code,
Section 21167.1(b)

1 Judgment having been entered in this proceeding, ordering that a peremptory writ of
2 mandate be issued from this Court,

3 IT IS ORDERED that, immediately on service of this Writ, Respondent The City of San
4 Jose shall:

- 5 a. Set aside and void the San Jose Planning Commission's Resolution No. 10-
6 036 adopting the Negative Declaration and approving the Shirazi Conditional
7 Use Permit No. CP09-015, known as Moe's Stop, located at 1604 McKee
8 Road, San Jose, California (hereinafter "Shirazi CUP");
- 9 b. Set aside Respondent City Council Resolution No. 75434 Upholding the
10 Planning Commission's Decision to Adopt a Negative Declaration for the
11 Expansion of an Existing Gasoline Service Station of a Site Located on the
12 Southeast Corner of McKee Road, San Jose, and 33rd Street;
- 13 c. An environmental impact report shall be prepared, pursuant to Public
14 Resources Code § 21080(d);
- 15 d. Respondent is further ordered to suspend all activities of the Shirazi CUP, as
16 defined in the Verified Petition for Writ of Mandate at page 4:3-8, that could
17 result in an adverse change or alteration to the physical environment until
18 completion of the environmental impact report and until Respondent has
19 brought its determination, finding or decision into compliance with the
20 requirements of CEQA.

21 IT IS FURTHER ORDERED that this Court will retain jurisdiction over Respondent's
22 proceedings by way of a return to the peremptory writ of mandate until the Court has determined
23 that Respondent has complied with the provisions of CEQA.

24 IT IS FURTHER ORDERED that Respondent must file a return to the Writ no later than
25 March 18, 2012.

26 DATED: March 27, 2011.



Honorable Kevin J. Murphy

THE FOREGOING INSTRUMENT IS
A CORRECT COPY OF THE ORIGINAL
ON FILE IN THIS OFFICE
ATTEST: DAVID H. YAMAGAKI

APR 01 2001

CHIEF CLERK / OFFICE CLERK
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
IN AND FOR THE COUNTY OF SANTA CLARA
BY CLERK



N.C. 100-1001-1001

EXHIBIT C

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SANTA CLARA

3 ---000---

4
5
6 ANDY'S BP, INC., ET AL.,

7 PLAINTIFF,

8 VS.

9 THE CITY OF SAN JOSE, ET AL.,

10 DEFENDANT.

11 NO. 1-10-CV-176412

12
13 O.S.C./T.R.O.

14
15 AUGUST 19, 2011

16 Judge Joseph M. Hiber
17 Dept. 21
18
19

20 APPEARANCES:

21 FOR THE PETITIONERS:

JAMES. M. DOMBROSKI
ATTORNEY AT LAW

22
23 FOR THE RESPONDENT:

MARGO LASKOWSKA
CHRIS NIELSEN
ATTORNEY AT LAW

24
25 FOR THE REAL PARTY
26 IN INTEREST:

GARY B. WESLEY
ATTORNEY AT LAW

27 OFFICIAL COURT REPORTER:

CATHY JAMELLO
C.S.R. NO. 5653

1 WOULD IN NO WAY VIOLATE JUDGE MURPHY'S ORDER, THERE'S
2 ABSOLUTELY NO BASIS FOR FURTHER INJUNCTION IN THE CASE
3 .WHATSOEVER.

4 THANK YOU, YOUR HONOR.

5 THE COURT: WELL, I FIND IT KIND OF INTERESTING,
6 BECAUSE WHAT I HAD IN FRONT OF ME ON THE T.R.O. WAS ONLY
7 THE WRIT AND MAYBE THE JUDGMENT AND I HAD A LOT OF
8 VERBAGE ARGUING IT WAS ALL TRAFFIC-RELATED TO IT, BUT
9 THERE ISN'T A THING IN THAT JUDGMENT OR MURPHY'S TWO-PAGE
10 ORDER THAT SPEAKS TO WE'RE DOING THIS BECAUSE OF TRAFFIC
11 IMPACT. FOR ALL I KNOW, IT'S BECAUSE IT MIGHT RAIN ON
12 THURSDAY. THAT'S A VERY, VERY BROAD ORDER, NEEDLESS TO
13 SAY. I UNDERSTAND THE SITUATION.

14 WHAT I'M GOING TO DO IS TAKE THIS UNDER
15 SUBMISSION.. I WILL FOR OUR PURPOSES CONTINUE IN EFFECT
16 THE T.R.O. UNTIL I MAKE THE RULING, WHICH WOULD BE IN THE
17 NEXT, PROBABLY IT WILL GO OUT MONDAY.

18 ANYTHING ELSE I NEED TO KNOW?

19 MR. DOMBROSKI: NO. THANK YOU, YOUR HONOR.

20 THE COURT: THANK YOU ALL.

21 MS. LASKOWSKA: THANK YOU, YOUR HONOR.

22 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)
23
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27
28

1 STATE OF CALIFORNIA }
2 COUNTY OF SANTA CLARA }
3

4 I, CATHY L. JAMELLO, DO HEREBY CERTIFY: THAT I
5 WAS APPOINTED BY THE COURT TO ACT AS COURT REPORTER IN
6 THE ABOVE-ENTITLED ACTION; THAT I REPORTED THE SAME IN
7 STENOTYPE AND THEREAFTER TRANSCRIBED THE SAME INTO
8 TYPEWRITING AS APPEARS BY THE FOREGOING TRANSCRIPTION;
9 THAT SAID TRANSCRIPT IS A FULL, TRUE, AND CORRECT
10 STATEMENT OF THE PROCEEDINGS, TO THE BEST OF MY ABILITY.

11 I FURTHER CERTIFY THAT I HAVE COMPLIED WITH CCP
12 237(A)(2) IN THAT ALL PERSONAL JUROR IDENTIFYING
13 INFORMATION HAS BEEN REDACTED IF APPLICABLE.
14

15 DATED THIS 25TH DAY OF OCTOBER, 2011.
16

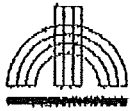
17
18 *Cathy Jamello*
19 CATHY JAMELLO
20 OFFICIAL COURT REPORTER.
21 C.S.R. NO. 5653

22 ATTENTION: CALIFORNIA GOVERNMENT CODE
23 SECTION 69954(D) STATES:

24 "ANY COURT, PARTY OR PERSON WHO HAS PURCHASED A
25 TRANSCRIPT MAY, WITHOUT PAYING A FURTHER FEE TO THE
26 REPORTER, REPRODUCE A COPY OF PORTION THEREOF AS AN
27 EXHIBIT PURSUANT TO COURT ORDER OR RULE, OR FOR INTERNAL
28 USE, BUT SHALL NOT OTHERWISE PROVIDE OR SELL A COPY OR
COPIES TO ANY OTHER PARTY OR PERSON."

---000---

EXHIBIT D



Robert L. Harrison
Transportation Planning and Project Management

2370 Vista Del Mar Lane
Tiburon, California 94920
Tel 415 435-2871
Fax 415 435-0118

October 23, 2011

Mr. James M. Dombroski, Esq.
Attorney-at-Law
P.O. Box 751027
Petaluma, CA 94975

Dear Mr. Dombroski:

This is in response to your request to prepare a review the Moe's Stop Gas Station Expansion traffic impact analysis (TIA) authored by Hexagon Transportation Consultants, Inc., dated August 15, 2011.

Overall Analysis Procedures

The Hexagon analysis follows standard TIA procedures in that it proceeds from an analysis of existing conditions to an existing plus project condition and then evaluates a baseline and baseline plus project condition. The analysis also includes the cumulative condition.

The scope of the analysis is limited to the study of the impact of the project on a single intersection that is adjacent to the project site. It is assumed that if the project has less than significant impact on this nearby intersection it will, therefore, have no significant impact on more distant intersections. This appears to be a reasonable assumption.

The Hexagon TIA includes no freeway impact analysis because the standard for such a study is that the project should generate trips equal to at least 1% of the capacity of the mixed flow lanes on the nearest freeway segment. While the TIA estimates freeway capacity at a "generous" 6,900 vehicles per hour or 2,300 vehicles per hour per mixed flow lane, even using a more standard 2,000 vehicles per hour per lane would result in a mixed flow lane capacity of 6,000 vehicles, a capacity so large that the project traffic would not equal 1% of the standard mixed flow lane capacity.

Existing Traffic Conditions

Traffic was counted at the intersection nearest to the project site, McKee Road and North 33rd Street, on May 25, 2011. The intersection Level of Service (LOS) at the intersection was found to be LOS C in both the AM and PM peak hours. This is an acceptable condition within the City of San Jose. However, it should be noted that while the major street, McKee Road operates at LOS C, significant delay is experienced by motorists on North 33rd Street. According to the LOS calculations, an average delay of about 58 seconds per vehicle or LOS E in both the AM and PM peak hours is experienced by drivers southbound on North 33rd Street.

Exhibit D

Letter to Mr. James M. Dombroski, Esq.
Page Two of Four

Project Trip Generation

The Hexagon TIA asserts that trip rates per fueling position are typically reduced when more pumps are added to a site. Based on this assertion, the TIA assumes that the project adding 6 fueling positions to the existing 6 fueling position would not double the existing trip generation.

The assertion is, however, not supported by data provided by the Institute of Transportation Engineers (ITE) in the publication Trip Generation Handbook, 2nd Edition. For the land use Gasoline/Service Station (944), the ITE provides a fitted curve equation relating trip generation to the number of fueling positions. According to the fitted curve equation, the expansion from 6 to 12 fueling positions would more than double the number of trips generated. The AM peak hour trips would increase by 110% and the PM peak hour trips would increase by 143%.

The Hexagon TIA approach to estimating project trips uses traffic counts taken in November 2009 at the Moe's Stop gas station and on May 24, 2011 at the nearby Gas & Shop service station. Because the Gas & Shop station has 12 fueling positions, the TIA asserts that the trips generated at Gas & Shop provide an appropriate trip rate to estimate what Moe's Stop would generate with 12 fueling positions. The net new project trips are then calculated by subtracting the Moe's Stop 6 fueling position trips as existed in 2009 from the existing May 2011 Gas & Shop 12 fueling position trips.

It is not clear that two different retailers would necessarily generate equivalent trips, under any set of assumptions. It is particularly doubtful that these two retailers with differing products and prices and with trip counts taken at dates nearly two years apart would be so comparable that a trip generation estimate could, or should, be made using a procedure that subtracts one trip count from the other.

An alternative trip estimate procedure uses trip generation research compiled by the ITE. Using the Moe's Stop existing 143 and 162 AM and PM peak hour trips respectively as counted in November 2009 and the trip growth factors for expansion from 6 to 12 fueling positions as described above from the ITE data, the net new project trips would be 157 trips and 232 trips in the AM and PM peak hours respectively. This trip generation estimate is compared to 72 and 76 AM and PM peak hour trips respectively as shown in the Hexagon TIA.

Pass-by Trips. The Hexagon TIA properly includes a reduction in net new trip generation due to pass-by trips. Pass-by trips are caused by motorists already in the traffic flow and merely stopping by the service station on their way to another destination. These trips do not add to the traffic flow on the local street system.

Letter to Mr. James M. Dombroski, Esq.
Page Three of Four

The Hexagon TIA uses data from the ITE Trip Generation Handbook referenced above to estimate a pass-by trip rate for the project. The TIA indicates the assumed pass-by rate is a "conservative" estimate as it is somewhat lower than found in the ITE data. The TIA report does not explain why a conservative approach was used.

However, the Moe's Stop and the Gas & Shop stations are known to offer some of the lowest priced fuel in the local area and as such may be described as more akin to destination stations rather than typical pass-by stations. The conservative approach to estimating a pass-by rate is therefore appropriate but would be better based on actual data rather than the arbitrary 50% pass-by rate used in the TIA.

The ITE trip research presents a range of pass-by trip rates from which an average is presented. For a typical service station the average rate is most appropriate. However, for these destination stations a rate at the lower end of the range of the research data should be used. Thus, for the Gasoline/Service Station (944) land use, the ITE research summary reports the lowest pass-by rates are 32% and 20% for the AM and PM peak hours respectively.

Using the ITE lowest pass-by rates, the net new trips generated by the project would be 107 trips and 186 trips in the AM and PM peak hours respectively. This compares to 36 and 38 net new trips in the AM and PM peak hours respectively as shown in the Hexagon TIA. The project would generate a significantly greater number of net new trips than as presented in the TIA. A summary of project trip generation using alternative calculation methods is shown in the table below.

Project Trip Generation Estimates				
Trip Generation Estimate Factors	Hexagon Consultants TIA		Alternative Procedure	
	AM Peak Hour	PM Peak Hour	AM Peak Hour	PM Peak Hour
Moe's Stop 2008 Traffic Count 6 fueling positions	143	182	143	182
Gas & Shop 2011 Traffic Count 12 fueling positions	215	238	N/A	N/A
ITE Trip Growth for expansion from 6 to 12 fueling positions	N/A	N/A	110%	143%
Project Trip Estimate Method	Subtract Moe's Stop Count from Gas & Shop Count		Use ITE Trip Growth Factors	
New Project Trips	72	76	157	232
Loss Pass-by Trips	-36	-38	-50	-46
Net New Project Trips	36	38	107	186
Sources: Hexagon Consultants; Moe's Stop One Station Expansion TIA, Table 4. Robert L. Harrison Transportation Planning.				

Letter to Mr. James M. Dombroski, Esq.
Page Four of Four

On-Site Circulation Issues

The Hexagon TIA recommends an on-site circulation plan (see TIA report Figure 9) that is intended to reduce traffic congestion on city streets. However, there are questions on the effectiveness of the plan that need to be resolved. For example:

1 - Access from N. 33rd Street - A full access driveway is planned for N. 33rd Street. This driveway would serve inbound traffic using N. 33rd Street from the north and south. However, there is no direct on-site route for departing drivers to return to the N. 33rd Street driveway. According to the TIA plan, to return to N. 33rd Street Moe's Stop patrons would be required to first exit the site onto westbound McKee Road, reenter the site, and travel through the site to reach the N. 33rd Street driveway. It is not likely that most drivers would choose to use such circuitous route resulting in on-site congestion in front of the store and the potential for outbound left turns onto McKee Road from the proposed right-turn-in only driveway. Such a turning movement occurring on McKee Road just 50 feet west of the intersection with N. 33rd Street would be hazardous and cause increased street congestion.

2 - Westerly Driveway on McKee Road - Planned to be right-turn-in and right-turn-out only. The current driveway provides full access including left turns to and from McKee Road. About 20% of existing Moe's Stop patrons make a left turn from this driveway onto eastbound McKee Road. Under the proposed plan these drivers would be directed to exit at the driveway on N. 33rd Street and then make a left turn at the intersection with McKee Road. However, as was described above, there is no direct on-site route proposed from the fuel pumps to the N. 33rd Street driveway. Drivers would first have to exit the site onto westbound McKee Road, reenter the site, and travel through the site to reach the N. 33rd Street driveway. As was described above, is not likely that most drivers would choose to use such an indirect route resulting in outbound left turns onto McKee Road from the proposed right-turn-in only driveway and/or on-site congestion in front of the existing store, or both.

3 - Easterly Driveway on McKee Road - Planned to be right-turn-out only. This driveway, located just 50 feet from the intersection with N. 33rd Street, will be difficult to limit to outbound traffic only. This is because it is the first project driveway motorists will see when traveling westbound on McKee Road. Some drivers will want to turn into Moe's Stop at this location. The driveway is proposed to be 16 feet wide and will not serve two-way traffic efficiently. The safety of traffic on McKee Road would be impacted if this driveway is used by two-way traffic.

Please let me know if there are any questions on the above analysis.

Sincerely,



Robert L. Harrison

EXHIBIT E



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

MARCO LASKOWSKA
Deputy City Attorney
Direct Line: (408) 535-1915

October 17, 2011

James M. Dombroski, Esq.
LAW OFFICE OF JAMES M. DOMBROSKI
P. O. Box 751027
Petaluma, CA 94975

BY FAX ONLY.

Re: ANDY'S BP, INC. v CITY OF SAN JOSE, et al.
Court Case Number: 1-10-CV-176412

Dear Mr. Dombroski:

This is in response to your e-mail from last Friday at about 3:45 p.m.

At the order-to-show-cause hearing on August 19, 2011, the Court found that the City did not violate the writ by issuing the permit adjustment AD11-574 that allowed the applicant, Moe's Stop, to cover-up exposed gas pipes, perform sidewalk repairs or replacement, and relocate a fire hydrant. Therefore, after the Court discharged the order-to-show-cause and denied Andy's BP's temporary restraining order, the permit adjustment no. AD11-574 was re-instated. (Because the Court specifically indicated that the City should not allow driveway relocation, driveway relocation is not part of that permit adjustment.)

As to your representation that Moe's Stop 1) repaired a pre-existing garage, 2) expanded the convenience store, 3) repaired the new gas pumps, and 4) allows cars to use pre-existing driveways, it is unclear from your e-mail and photographs how any of these alleged activities would trigger a City permit requirement or CEQA review. Repairs to a pre-existing garage and allowing cars to use pre-existing driveways appear permissible. Keeping the site safe by repairs to gas-pumps also appears permissible. While you have not indicated in what manner Moe's Stop has expanded the convenience store (and such information is not evident from the photographs provided), if the claimed expansion consists of merely adding display or adding stock and trade, it would not implicate any City review. While the City appreciates your interest in keeping the City informed as to activities occurring on the Moe's Stop site, thus far, it is not apparent from the information provided that City involvement is necessary.

200 East Santa Clara Street, 16th Floor Tower, San Jose, CA 95113-1905 tel (408) 535-1900/fax (408) 998-3131

804435

Exhibit E

Re: Andy's BP et al. v. CSJ
October 17, 2011
Page 2

Finally, as to your request to postpone the City Planning Commission hearing regarding the EIR for the Moe's Stop site, City staff have indicated that they are prepared to move that item forward for Planning Commission consideration and know of no reason such hearing would need to be deferred. .

Thank you.

Very truly yours,

RICHARD DOYLE, City Attorney

By: Margo Laskowska
MARGO LASKOWSKA
Deputy City Attorney

MKL/mkl

Cc: Thomas Saberi, Esq. (by fax only)
Gary Weasley, Esq. (by fax only)

EXHIBIT F

1 RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
2 MARGO LASKOWSKA, Deputy City Attorney (187252)
Office of the City Attorney
3 200 East Santa Clara Street, 16th Floor
San José, California 95113-1905
4 Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
5 E-Mail Address: cao.main@sanjoseca.gov

6 Attorneys for THE CITY OF SAN JOSE

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SANTA CLARA

10 UNLIMITED JURISDICTION

11 ANDY'S BP, INC., a California corporation,
and ANDY SABERI, an individual,

12 Petitioners,

13 v.

14
15 THE CITY OF SAN JOSE, and DOES 2-25,
inclusive,

16 Respondents.

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19 AMIR SHIRAZI, Individually and dba MOE's
STOP, and AMIR SHIRAZI, as Trustee for
20 the MOHAMMAD M. SHIRAZI LIVING
TRUST,

21 Real Parties in Interest.
22
23

Case Number: 1-10-CV-176412

DECLARATION OF JOSEPH
HORWEDEL IN SUPPORT OF CITY
OF SAN JOSE'S RESPONSE TO
ORDER TO SHOW CAUSE RE
CONTEMPT

Date: August 19, 2011

Time: 9:00 a.m.

Dept.: 21

24 I, JOSEPH HORWEDEL, declare that:

- 25 1. I am the Director of the City of San Jose's Department of Planning, Building, and
26 Code Enforcement. I have held that position since November 2006. I have been
27 employed with the City of San Jose since 1983. I have personal knowledge of each
28

Exhibit F

- 1 fact stated in this declaration. As to matters stated on information and belief, I believe
2 them to be true.
- 3 2. My duties include managing the development review functions for the City and
4 assisting customers in the permit process. Permit adjustment applications such as
5 the one submitted on July 14, 2011 regarding file number AD11-574, attached here
6 as Exhibit A are one type of permit applications. On July 21, 2011, I reviewed the
7 development permit adjustment, attached here as Exhibit B. The permit adjustment
8 includes a map of the site with my handwritten notation that driveway relocation was
9 not approved. The Adjustment was formally approved on July 22, 2011.
- 10 3. This permit allowed only to cover up piping, sidewalk improvements, and fire hydrant
11 relocation. Those items were unrelated to the previous Conditional Use Permit for
12 this property for gas station expansion.
- 13 4. The Planning Department does not issue permits for moving fire hydrants. Fire
14 hydrants are not within the jurisdiction of the Planning Department because they are
15 not "building[s], structure[s], or land" within the meaning of Chapter 24.10 of the San
16 Jose Municipal Code that regulates commercial zoning districts. The fire hydrant is in
17 the public right-of-way and belongs to the Water Company, and in order to have it
18 moved, the City of San Jose's Public Works Department needs to issue an
19 encroachment permit. Out of abundance of caution, however, the Planning
20 Department reviewed the issue in order to ensure that Public Works is informed that
21 relocation of the fire hydrant would not violate the California Environmental Quality
22 Act ["CEQA"] and is not covered by the old Conditional Use Permit ["CUP"].
- 23 5. The same logic applies to replacement or repairs to sidewalks—typically they do not
24 need Planning Department permits. The City, however, required the applicant in this
25 case to go through the permitting process regarding proposed sidewalk improvements
26 as an additional precaution to ensure that it would not violate CEQA or the CUP. I
27 understand that sidewalk improvements in this case would involve removal of an old
28

1 unused driveway; because such uneven surface could potentially constitute a trip
2 hazard, installation of a new sidewalk is advisable, anyway.

3 6. As to covering up the hole in the pavement, again, the Planning Department does not
4 issue permits for such work—inspections of gas tanks are in the jurisdiction of the
5 Santa Clara County Fire Department. I am informed that the excavation at the site
6 was done to move an existing gasoline pump to the area with the three new, non-
7 functioning, pumps. Covering up the excavation would place concrete where there
8 was concrete before. I am informed and believe that the exposed pipes in the fenced
9 off area on the property are active and service the pumps that are currently in
10 operation. I am informed and believe that the fiberglass piping was not designed for
11 prolonged exposure to ultraviolet radiation—it degrades in sunlight. The pipes
12 should, therefore, be covered up for safety reasons. Additionally, even though the
13 area is fenced off, the chain-link fence would not protect the gas lines and tank if
14 there was an accident, for example if a car swerved into them.

15 7. In contrast to the fire hydrant relocation, sidewalk improvements, and covering gas
16 pipes, I did not approve the requested permit adjustment for driveway relocation
17 because it could arguably be related to the CUP as it would affect circulation on the
18 site.

19 8. In response to the Court's Amended Temporary Restraining Order dated July 27,
20 2011, the Planning Department retroactively rejected the Development Permit
21 Adjustment Application.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct.

24 Executed this 3rd day of August 2011 at San Jose, California.

25 
26 JOSEPH HORWEDEL
27
28



CITY OF SAN JOSE
Planning, Building and Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113-1905
tel (408) 535-3555 fax (408) 292-6056
Website: www.sanjoseca.gov/planning

PERMIT/MAJOR PERMIT ADJUSTMENT APPLICATION

TO BE COMPLETED BY PLANNING COUNTER STAFF			
FILE NUMBER <u>AD 11-574</u>		RECEIPT # _____	
PROPERTY LOCATION/ ADDRESS <u>1604 MCKEE RD.</u>		DATE <u>7/14/11</u>	
QUAD # <u>—</u>	ZONING <u>CP</u>	AMOUNT <u>\$ 514.-</u>	
PD ZONING FILE # <u>—</u>	PERMIT FILE # <u>—</u>	BY <u>A. BATTY</u>	
<input type="checkbox"/> RESIDENTIAL <input checked="" type="checkbox"/> COMMERCIAL <input type="checkbox"/> INDUSTRIAL			

TO BE COMPLETED BY THE APPLICANT (PLEASE PRINT OR TYPE)	
PROPERTY LOCATION/ ADDRESS <u>1604 MCKEE ROAD, SAN JOSE, CA 95116</u>	
ASSESSOR'S PARCEL NUMBER(S) (Attach Map) <u>481-03-016 481-03-017</u>	
DESCRIPTION OF THE PROPOSED MINOR CHANGE (Approval is limited to description contained herein) <u>COMB-UP PIPING, DRIVEWAY RELOCATION & SIDEWALK IMPROVEMENT</u> <u>PIRE HYDRANT RELOCATION</u>	
DOES THE PROJECT INVOLVE HUD FEDERAL FUNDING/ASSISTANCE? <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES Please indicate whether HUD Funding has been awarded, is proposed, or is anticipated, for the proposed project. If yes, indicate type of funding (i.e. CDBG Grant, HOME Investment Partnership Program, Section 108 Loan Guarantee, etc.), funding amount, whether awarded (if known) or application is pending, and fiscal year of award or application request.	
PLEASE NOTE: Projects involving 1) acquisition of real property involving a change of use, or 2) new construction require an Environmental Assessment (EA). Concurrent environmental review per the California Environmental Quality Act (CEQA) is also required. The obtainment of a qualified environmental consultant to provide documentation services (i.e. a combined Initial Study/EA) is strongly required.	
SIGNATURE OF PROPERTY OWNER REQUIRED	
Check One: <input type="checkbox"/> I hereby certify that a Homeowner's Association/Architectural Review Committee does exist and have reviewed this project. Please include a copy of their letter and comments with the application. <input checked="" type="checkbox"/> I hereby certify that a Homeowner's Association does not exist to comment on the requested change to my property.	
PRINT NAME OF PROPERTY OWNER <u>AMIR CHIRAZI</u>	DAYTIME TELEPHONE # <u>(408) 206-9088</u>
ADDRESS <u>1604 MCKEE ROAD</u>	CITY <u>SAN JOSE</u> STATE <u>CA</u> ZIP CODE <u>95116</u>
REQUIRED SIGNATURE OF PROPERTY OWNER (see page 2)	DATE <u>7-14-11</u>

PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, 1ST FLR, CITY HALL. APPOINTMENTS ARE NOT REQUIRED BUT MAY BE ACCOMMODATED BY CALLING (408) 535-3555.

PERMIT ADJUSTMENT APPLICATION

CONTACT PERSON				
PRINT NAME/COMPANY VICTOR YATCO / ZAMORA & ASSOC				
ADDRESS 2025 TIMBERLAKE COURT		CITY SAN JOSE	STATE CA	ZIP CODE 95128
PHONE # (408) 274-4924	FAX # (408) 274-4924	E-MAIL ADDRESS YATCO@PRODIGY.NET		

Please complete the FRONT sheet of this application and provide the following:
INCOMPLETE APPLICATION WILL NOT BE ACCEPTED.

- ☐ **FILING FEE:**
\$314* - Checks are made payable to the "City of San Jose".
\$749* for Major Adjustment.
\$623* for each adjustment after the 1st to process simultaneously.
\$156* per hour for consultation regarding review of a proposal prior to filing the application.

*includes the General Plan Update fee

- ☐ **PROPERTY OWNER SIGNATURE.** Can be submitted as original wet signature, faxed copy signature or electronic signature or only the property owner or representative who has Power of Attorney (POA) can sign this application. A copy of the POA must be submitted with this application.

- ☐ **ASSESSOR'S PARCEL MAP** marked with the project location.

- ☐ **PHOTOGRAPHS** of existing building or subject area.

- ☐ **Four (4) COPIES** of the development plans. An Additional plan set is required if stormwater is required. The development plan should include:

- A **SITE PLAN* DRAWN TO SCALE** showing the location of the proposed changes on the subject property, and
- A **DRAWING TO SCALE** of the proposed change (elevations, floor plans, construction, details, as appropriate).

* A Site Plan should contain the following basic information:

- Dimensions of subject property, lot lines, and existing and proposed driveways.
- Streets adjoining the subject property.
- Existing and proposed buildings and structures, including proposed building removal.
- Dimensions of existing and proposed setbacks.
- Existing and proposed off-street parking, loading, landscape and circulation areas.

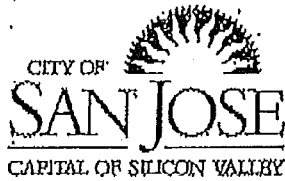
- Existing trees to be removed. Include circumference of tree at 2 feet above ground level as well as distances from existing and proposed structures and/or trees on the site.

• **Stormwater Control Plan:**

(A Stormwater Control Plan is required for all projects creating, replacing or expanding impervious surface by 10,000 square feet or more)

- Complete the Pervious and Impervious Surfaces Comparison Table located below.
- All existing natural hydrologic features (depressions, names of watercourses, etc.) and significant natural resources.
- Specify soil type(s).
- Specify depth to groundwater.
- 100-year flood elevation.
- All existing and proposed topographic contours with drainage areas and sub areas delineated and arrows showing flow direction.
- Separate drainage areas depending on complexity of drainage network.
- For each drainage areas, specify types of impervious area (roof, plaza, sidewalk, streets, parking, etc) and area of each.
- Show location, size, and identification (including description), of Source Control Measures (SCMs) and Water Quality Treatment Control Measures (TCMs) such as swales, detention basins, infiltration trenches, etc.
- Details of all proposed water quality treatment control measures.
- Location, size and identification of proposed landscaping/plant material.
- Ensure consistency with Grading and Drainage Plan and Landscape Plan.
- Supplemental Report :
 - Calculations illustrating water quality treatment control measures meet numerical standards set forth in Post-Construction Urban Runoff Management Policy No. 8-29.
 - Name and location of receiving water body.

PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, 1ST FLR, CITY HALL. APPOINTMENTS ARE NOT REQUIRED BUT MAY BE ACCOMMODATED BY CALLING (408) 535-3555.



Department of Planning, Building and Code Enforcement

JOSEPH HORWEDER, DIRECTOR

DEVELOPMENT PERMIT ADJUSTMENT

PROJECT FILE NO.: AD11-574
PERMIT TO BE ADJUSTED: N/A
PROJECT DESCRIPTION: Permit Adjustment to cover-up piping, sidewalk improvements, and fire hydrant relocation.
PROJECT LOCATION: 1604 MCKEE ROAD
A.F.N.(s): 481-03-017
ZONING: CP Pedestrian Commercial
GENERAL PLAN: GC

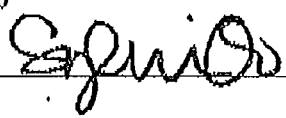
ACTION: Approved

SUBJECT TO THE FOLLOWING CONDITIONS: This permit to allow to allow the cover up of piping, sidewalk improvements, and fire hydrant relocation only. Driveway relocation was not approved as part of this Permit Adjustment and shall be subject to a Conditional Use Permit for the service station.

Conformance with Municipal Code. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code, including, but not limited to, use of property and off-street parking requirements.

Plan Set: ☒ Yes ☐ No

Approved by: Sylvia Do

Signature: 

Action Date: July 22, 2011

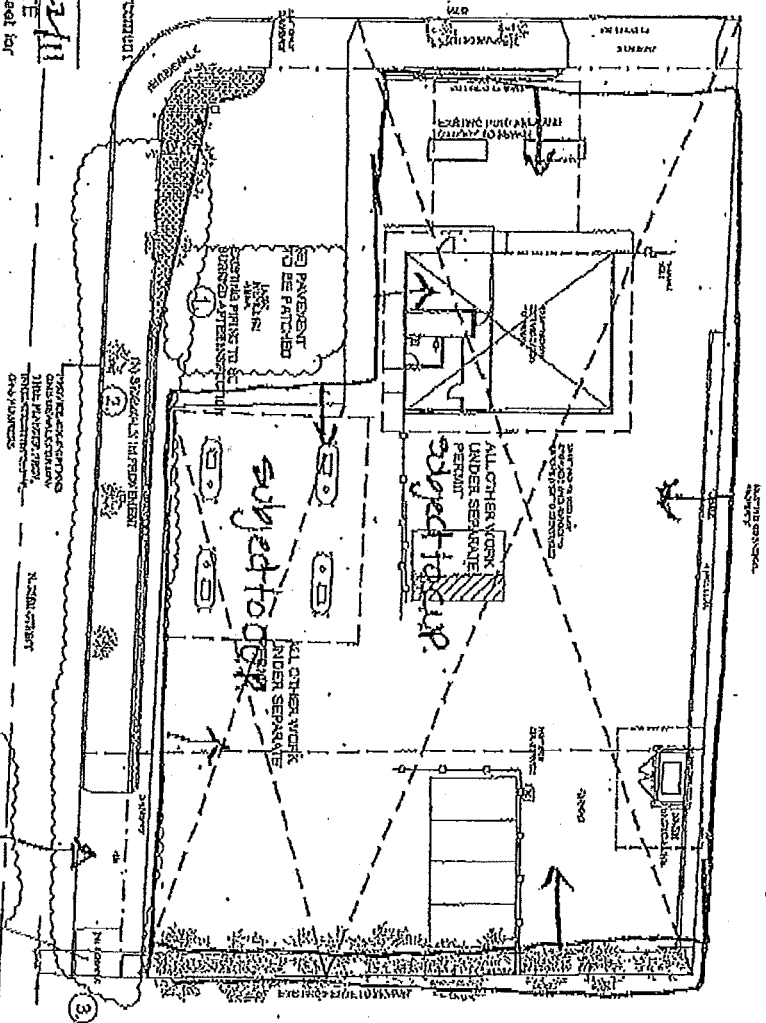
This permit sheet is only valid when accompanied by an original signature and when fastened to a stamped plan set, if applicable.

CITY OF SAN JOSE
 Department of Planning, Building & Code Enforcement
 File No: ADJ-674
 BY: SQUAT CO DATE: 1/22/11
 See attached Development Permit Adjustment sheet for
 conditions of approval.
 Note: A Building Permit may also be required. Please
 check with the Building Division.

- LEGEND SCOPE OF WORK
- ① FRESH PIPING AND COVER PIPING/TANK
 - ② RELOCATE FIRE HYDRANT TO NEW LOCATION FOR FUTURE
DRIVEWAY
 - ③ SIDEWALK ALONG N. 38RD STREET IMPROVEMENT,
REPAVING AND LANDSCAPING

① PARTIAL SITE PLAN
 20' x 10' 10"

Driveway relocation
 Not approved with
 this adjustment. Subject
 to CUP for same
 station



APPROVED AND ASSOCIATES ENGINEERS 1000 N. 1ST STREET SAN JOSE, CA 95128 (408) 281-1111 www.associates-engineers.com		SOUTH VALLEY DIVISION FOR CONSTRUCTION	CIVIL ENGINE 1000 N. 1ST STREET SAN JOSE, CA 95128 (408) 281-1111 www.associates-engineers.com
PERMIT ADJUSTMENT FOR MOE'S STOP GAS AND SERVICE STATION 1000 N. 1ST STREET, SAN JOSE, CA 95128			
SHEET NO. A-1			

EXHIBIT G



Department of Planning, Building and Code Enforcement

BP # 10-029749

STOP WORK ORDER

ADDRESS 1604 McKee Road Bldg. # Suite #

☒ Residential ☒ Commercial ☐ Industrial ☐ Other

Description of purported violation(s):

You are directed to cease and desist the work described above because:

- ☐ No permit(s) have been located in our files for the work in progress.
- ☐ The work does not conform to the approved plans and / or building permit(s).
- ☐ The work is in violation of the Zoning Ordinance.
- ☐ The work does not conform to Planning Permit No.
- ☒ Other: ENVIRONMENT REPORT NEEDS APPROVED BY PLANNING

The above cited work cannot resume until the Stop Work Order has been rescinded in writing by:

- ☒ Building Division 200 East Santa Clara Street, San Jose, CA 95113 (408) 535-3555
- ☐ Building Code Compliance Section 170 West San Carlos Street, San Jose, CA 95113 (408) 277-4528

Inspector: M. HSIEN AM. Adair 3-14-11
Print Sign Date

First page - Office Copy

Second page - Customer Mail Out Copy

Third page - Postcard at Job Site

APPLICANT: AMIR SHIRAZI